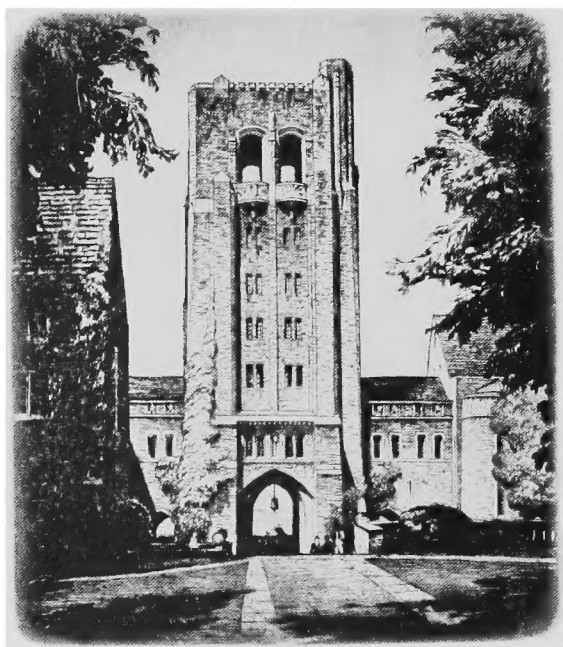


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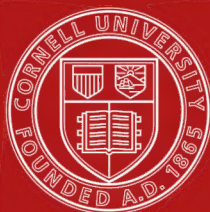
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THE
LAW OF CONTRACTS.

BY
W. Cook
THEOPHILUS PARSONS, LL. D.

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AT CAMBRIDGE.

VOLUME I.

SECOND EDITION.

BOSTON:
LITTLE, BROWN AND COMPANY.

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RIVERSIDE, CAMBRIDGE:

PRINTED BY H. O. HOUGHTON AND COMPANY.

TO

WILLIAM H. PRESCOTT, ESQ.,

THE HISTORIAN OF SPAIN, MEXICO, AND PERU.

I MIGHT, perhaps, find some excuse for dedicating this work to you, in the natural desire of connecting my own labors with those which have won for you and for our country so much renown. And even more in the friendship which began so long ago we cannot remember its beginning; and in the long years that through childhood, youth, and manhood, have brought us upon the confines of age, if not beyond them, has never for a moment been broken.

But neither of these is my principal motive. That, I must confess to be, a strong and irrepressible desire to speak of your father; to express, however imperfectly, my gratitude to him; and to execute, even in this slight degree, the purpose I have long had, of putting on record my testimony to the excellence of one who stood for many years at the head of his profession, who was my master during my apprenticeship to the law, and ever after my revered instructor and invaluable friend.

It was in 1815 that I entered his office as a student. I had been accustomed all my life to see him often, and hear him often spoken of, for our families were intimate, and he was among my father's most valued friends; and I had always heard him mentioned with a kind and degree of respect that seemed to be paid to him alone. I knew that he had held the highest place in his profession for some years; but the regard and reverence generally accorded to him were more than any mere professional success could

win. When I entered his office, he had already given up a large part of his business. He did not go often into court; but I heard him in some important cases, and was a constant observer of the relations between him and his numerous clients. And it was not long before I learned the grounds of his high social and professional position.

In the first place let me speak of his judgment and sagacity. I cannot conceive of any person possessing, in greater perfection, that admirable thing we call *good sense*. I doubt whether, in his long and active life, he ever made any one mistake of importance. Whoever employed him in any business, soon saw that the wisest thing that could be done in his case, and at every step of it, was always the very thing that was done. Hence a confidence without limit was reposed in his opinion; and his advice was accepted and followed by all who received it, as if it made farther inquiry or consideration wholly unnecessary.

The next quality I would mention was a kindred and connected one; I mean his perfect truthfulness. It seemed as if he could not deceive; and if he had the faculty originally he must have lost it by *non user*. It made no difference on which side of a question the party propounding it to him stood; for his answer was to the question, and not to the man. Whether he dealt with a client, an adverse party, a witness, the jury, or the court, he dealt with them all, honestly. He had, what I am sorry to call the rare quality, of loving truth so well, that his view of it was not to be distorted or obstructed either by any interest or any feeling of his own or of those whom he represented, or by any disturbing influences of circumstances or position.

I speak last of his learning, although this was perhaps more frequently remarked upon than his moral qualities, however deeply they were felt. He had passed many years in laborious and well-directed study; for he was led to this,

both by his sense of duty to his clients, and by his sagacity, which told him that here he must find the means of sound judgment and usefulness and success; and also by the love of his profession and of the law as a science. For many years after he had withdrawn from the profession, both as advocate and chamber-counsel, he still continued his legal studies; and often when I have called upon him and stated some difficult question which had occurred in my practice, he would — not for a fee — but in his kindness to me, and his love of the law, enter upon the investigation with the zeal of earlier days, and give me the whole benefit of his vast knowledge and his unerring sagacity.

To these qualities I must add that of universal kindness and unfailing courtesy. And certainly I have given good reasons why he held so long the headship of a profession in which it is not easy to climb to the high places, and very difficult to hold them; and also, why, outside of his profession and by society at large, he was venerated during his long life as few men among us have ever been. Let me add that, while he manifested, wherever in the conduct of his affairs it was needed, the firmness and fearlessness that he inherited from a father who stood like a tower of strength in command of the American forces at Bunker Hill, he was ever, and remarkably, unassuming, retiring, and modest. It is difficult to believe that he could not measure his own success, or that he did not know his high position; but no one ever heard a word or a tone from him which indicated such knowledge.

He was not eloquent, and never, to my knowledge, attempted to be; and yet he was a most successful advocate. It was his purpose and endeavor to do for every client, and in every case, all that could be done by learning, sense, industry, and honesty; this he knew he could do, and did. And more than this he had no desire to do.

SUCH WAS WILLIAM PRESCOTT. When he died in 1844, at the age of 82, I had known him intimately for twenty-nine years, and had known of him many more. And I never yet heard a word spoken, and I never heard *of* a word spoken, to his disparagement or dispraise, during his long life or since its close, by any person whomsoever; not even have I heard the "but" or "if" with which many indulge themselves in qualifying and clouding the commendation they cannot but render. He has left behind him no brilliant speeches to be remembered and quoted; no books in which the fruits of his learning and wisdom were gathered and preserved; and they who knew him are passing away, and already his reputation is becoming traditional. And very glad shall I be, if, by this slight memorial, I may, for a single moment, arrest the waves of time, in their advancing flow over the sands in which are written his name, and the names of many other of our best and greatest.

THEOPHILUS PARSONS.

CAMBRIDGE,
October, 1853.

PREFACE

TO THE FIRST EDITION.

THE title of the thirtieth chapter of the Second Book of Blackstone's Commentaries is, "Of title by gift, grant, and *contract*." And in no other chapter does he treat of the law of contracts under that name. Since the publication of that work, many treatises on this subject have been published in England and in this country ; some of them are large volumes, and the latest are the largest. But I have thought that a work of still wider extent ; that is, embracing some topics not usually presented in these treatises, and exhibiting the principles of law upon many subjects more fully, would be useful to the student and the practitioner. There is, perhaps, no definite standard by which we may determine what, and how much, a work on this branch of the law should contain. The law of contracts may be said to include, directly or indirectly, almost all the law administered in our courts. But the line must be drawn somewhere ; and I hope it will be found that I have not wandered too far from the proper limits of my subject, in my desire to present it fully, and to give to all its principles the light they reflect upon each other.

This work is larger than any of its predecessors ; but, for finding room in the text for all I wished to say

in it, I have relied mainly on a peculiarity in its plan ; that is, on the rigorous exclusion from the text, of all cases. I have endeavored to state in the text the principles and rules of the law, as accurately, as compactly, and as logically as I could ; and in the notes, and there only, I have given my authorities. Such was my rule ; and the exceptions to it are few ; and my reason for it, in addition to the saving of space, was this. If the text of any book is composed, in any considerable degree, of selected cases, whoever uses the book (whether in learning or in practising the law) will naturally suppose that these cases contain the prevailing, if not the whole, authority on that topic, for they are selected and presented for that very purpose ; but, if he relies upon them, he may be afterwards surprised by the exhibition of other cases, equally authoritative, but leading to opposite conclusions. These also may have been referred to by name in the notes, and even the word “contra” affixed to them, but perhaps they are not within the reader’s reach, or he has not time to examine them ; and, at all events, nothing which is said of them in a foot-note, would place them on an equality with their favored opponents. Undoubtedly, a text-writer upon any branch of the law has strong inducements to make up his book by quotation from authorities. Not merely because it fills a page and disposes of a topic with little labor, but because on all obscure or controverted questions it is easy, by ample quotation, to seem to state the law, and yet avoid both the toil of investigation, and the responsibility of decision.

I have endeavored to state in the text what I think to be the law; and in the notes I have endeavored to enable the reader to judge for himself whether I am right. Cases which are only direct authorities for the statements in the text are generally referred to only by name and place. If they illustrate these statements, still more if they modify them, or contradict them, they are given by quotation, or abstract, at greater or less length, as their respective importance seemed to demand. Indeed, I have wished to enable the reader to investigate a question as he would do it in a complete library, so far as a single work of moderate size could accomplish this. The Reports are now so numerous that few persons endeavor to possess them all; and it was thought that this circumstance would give additional value and utility to a full exhibition of authorities. At this School, we have, I believe, a more complete collection than exists elsewhere of law books in the English language; for in England they have not, as far as I know, full collections of American law, and nowhere else in this country is it attempted, as I suppose, to make the series, both of English and American text-books and reports, absolutely perfect; this we aim at, and, with few exceptions, accomplish. And only where I could use such a library should I have endeavored to give to all the parts of so wide a subject as the law of Contracts this fulness of annotation.

Nor would it have been possible for me to have performed alone all the labor necessary for this purpose; and in the preparation of these notes I have been very

greatly indebted to Mr. E. H. Bennett, one of the able editors of the very valuable reprint of English Law and Equity Reports, to Mr. A. W. Machen, formerly, and to Mr. G. C. Langdell, now, Librarian of our Law School, and to Mr. E. L. Pierce and other gentlemen connected with it as students. Few things are more vexatious than to search for an authority referred to as pertinent to a question under investigation, and either fail of finding it, or discover that it is wholly irrelevant. I believe I may say, that all that labor and care could do to prevent this has been done. More than six thousand cases are referred to in this volume ; but from the beginning to the end of the book no case is cited because cited elsewhere, none merely on the authority of an index or digest, or of a marginal or head note, none without actual investigation of the case in its whole extent, and none without a subsequent and independent verification of the citation. But no care nor labor can wholly avoid mistakes ; and as the plan of this work is somewhat novel, and it embraces a great variety of topics, and presents questions which it is not only difficult, but, at present, impossible, to settle on authority, I dare only to hope that the errors of the work will not be found so numerous or so grave as to impair materially its utility. And if other editions are called for, great care will be taken to profit by all the defects discovered, and all the emendations suggested.

It may be noticed, that the citations and references are confined, not absolutely, but very much, to adjudged cases. I hope it will not be supposed that I wish to in-

timate that I have made my book without using the labors of those who have preceded me; for I have supposed it to be not only my right, but my duty, to make the utmost possible use of all our text-books. But I do not often refer to them. They have not the same authority as adjudications; and a mere reference to a text-book would be of little use to a reader who, not having access to the volume, could not verify it; while one who could turn to the book would generally find with great ease, by means of the index, the author's view of the topic under consideration. I have therefore avoided these references generally; and have thereby gained what I needed most, space for authorities.

The order under which the various topics of the very comprehensive subject of this work should be considered is not determinable by any precise rules; and without supposing that I have invented a division and arrangement which may be regarded as logically precise and accurate, I have found one which was very convenient to me, and I have not seen reason to believe that those who use the book will find it particularly objectionable. But one effect of this method should perhaps be suggested; and that is the difference in the apparent proportions of the space given to different topics. Thus, "Sales" may be thought to occupy a comparatively small space; but it will be found that under the distinct heads of Consideration, Assent, Warranty, Guaranty, Stoppage in Transitu, Construction, Statute of Frauds, &c., &c., many things are said which would be said in connection with Sales, if that were the only or the chief

topic of the book. But these same things are to be noticed also in connection with other topics ; and it was thought best to speak of them once for all, when discussing the distinct subjects to which they more particularly belong. And in this way I have perhaps avoided some portion of the repetition which, both from the nature of the subject as presenting many topics again and again under a great variety of aspects, and from the difficulty which others have found in escaping it, might be thought to belong almost inevitably to any treatment of the law of contracts.

T. P.

CAMBRIDGE,
October, 1853.

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PART I.

THE LAW OF CONTRACTS

CONSIDERED IN REFERENCE TO

THE OBLIGATIONS

ASSUMED BY

THE PARTIES.

THE LAW OF CONTRACTS.

PRELIMINARY CHAPTER.

SECTION I.

OF THE EXTENT AND SCOPE OF THE LAW OF CONTRACTS.

THE Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfilment of contracts.

Even those duties, or those acts of kindness and affection, which may seem most remote from contract or compulsion of any kind, are nevertheless within the scope of the obligation of contracts. The parental love which provides for the infant when, in the beginning of its life, it can do nothing for itself, nor care for itself, would seem to be so pure an offering of affection, that the idea of a contract could in no way belong to it. But even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of obligation, there is still such an obligation. It is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes the performance of these duties the condition of the preservation of human life; and by the implied obligation on the part of the unconscious objects of this

care, that when, by its means, they shall have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt. Indeed, the law recognizes and enforces this obligation, to a certain degree, on both sides, as will be shown hereafter.

It would be easy to go farther, and show that in all the relations of social life, its good order and prosperity depend upon the due fulfilment of the contracts which bind all to all. Sometimes these contracts are deliberately expressed with all the precision of law, and are armed with all its sanctions. More frequently they are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of the parties. Far more frequently they are not expressed at all; and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge. In this sense, *contract* is coördinate and commensurate with *duty*; and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide though not a universal application, that whatsoever it is certain a man ought to do, that the law supposes him to have promised to do. "Implied contracts," says Blackstone, (vol. ii. p. 443,) "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." These contracts form the web and woof of actual life. If they were wholly disregarded, the movement of society would be arrested. And in so far as they are disregarded, that movement is impeded or disordered.

If all contracts, express or implied, were carried into full effect, the law would have no office but that of instructor or adviser. It is because they are not all carried into effect, and it is that they may be carried into effect, that the law exercises a compulsory power.

Hence is the necessity of law; and the well-being of society depends upon, and may be measured by, the degree in which the law construes and interprets all contracts wisely; eliminates from them whatever is of fraud, or error, or otherwise wrongful; and carries them out into their full and proper

effect and execution. These, then, are the results which the law seeks. And it seeks these results by means of *principles*; that is, by means of truths, ascertained, defined, and so expressed as to be practical and operative. There are many of the rules of law which do not come within this definition of *principles*. They are formal or technical; but they are subsidiary to, and needed or useful for the comprehension, application, and enforcement of principles; and these formal rules derive their whole power and value from the principles which they explain, or enforce and perpetuate.

It is said that the law seeks these results by means of principles; and these again, in their most general form, may be said to be, first, those rules of construction and interpretation which have for their object to find in a contract a meaning which is honest, sensible, and just, without doing violence to the expressions of the parties, or making a new contract for them; and, secondly, those which discharge from a contract whatever would bring upon it the fatal taint of fraud, or is founded upon error or accident, or would work an injury. And if these elements of wrong are so far vital to any contract, that when they are removed it perishes, then the law annuls or refuses to enforce that contract, unless a still greater mischief would thereby be done.

Subsidiary to these are the rules and processes of the law, by means whereof a contract, which in itself is good, and has been properly construed, and is free from all removable elements of wrong, is enforced, or carried into execution.

SECTION II.

DEFINITION OF CONTRACTS.

A contract, in legal contemplation, is an agreement between two or more parties, for the doing or not doing of some specified thing. (*a*)

(*a*) "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." *Marshall*, C. J., *Sturges v. Crowninshield*, 4

Wheat. 197.—"A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 Blackstone's Comm. 446.—In *Siden-*

It has been said that the word agreement is derived from the phrase "*aggregatio mentium*." (b) This is at least doubtful, and was probably suggested by the wish to illustrate that principle of the law of contracts which makes an agreement of minds of the parties or the consent and harmony of their intentions, essential. They must both propose and mean the same thing, and in the same sense.

The word "contract" is of comparatively recent use, as a law term. Formerly, courts and lawyers spoke only of "obligations," (c) — meaning thereby "bonds," in which the word "oblige" is commonly used as one of the technical and formal terms, — "covenants," and "agreements," which last word was used as we now use the word "contract." The word "promise" is often used in instruments, and sometimes in legal proceedings. "Agreement" is seldom applied to specialties; "contract" is generally confined to simple contracts; and "promise" refers to the engagement of a party, without reference to the reasons or considerations for it, or the duties of other parties.

In the above definition of a contract, no mention is made of the consideration. The Statute of Frauds requires, in many cases, and for many purposes, that the "agreement" shall be in writing, and some note or memorandum thereof be signed by the party sought to be charged. Under this provision, it has been much controverted whether the word "agreement" so far implies a "consideration," that this also must be in writing. This question will be considered in a subsequent part of this work. (d) We have not included the con-

ham and Worlington's case, 2 Leon. 224, 225, which was an *assumpsit*, founded upon an executed consideration, *Perram, J.*, conceived that the action did well lie, and he said there was a great difference between *contracts* and that case:—"For in contracts upon sale the consideration and the promise, and the sale, ought to meet together, for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts every thing which is requisite ought to concur and meet together; namely, the consideration, of the one side, and the sale or the promise on the other side. But to maintain an action

upon an *assumpsit*, the same is not requisite, for it is sufficient if there be a moving cause, or consideration precedent, for which cause or consideration the promise was made."—See also the able article on the definition and division of contracts, 20 Am. Jur. 1.

(b) Per Pollard, serjeant, *arguendo* in *Reniger v. Fogossa*, Plowden, 17.

(c) See the Abridgments of Brooke, Rolle, Bacon, &c.

(d) And see *Wain v. Walters*, 5 East, 16; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Violet v. Patton*, 5 Cranch, 142; *Packard v. Richardson*, 17 Mass. 122; *Sage v. Wilcox*, 6 Conn. 81.

sideration in the definition of the contract, because we do not regard it as, of itself, an essential part thereof. But for practical purposes it is made so by some important and very influential rules, and we shall presently treat of the consideration as one of the elements of a legal contract.

SECTION III.

CLASSIFICATION OF CONTRACTS.

The most general division of contracts is into contracts by specialty and simple contracts.

Contracts by specialty are those which are reduced to writing and attested by a seal—or, to use the common phrase, contracts under seal; and contracts of record. These last are judgments, recognizances, and statutes staple. But the term “contracts by specialty” is sometimes confined to contracts under seal. In the present work we shall speak chiefly, but not exclusively, of contracts not under seal.

Simple contracts are all of those which are not contracts by specialty. It is not accurate in point of language to distinguish between *verbal* contracts and *written* contracts; for whether the words are written or spoken, the contracts are equally *verbal*, or expressed in words. Nor is it accurate in point of law to distinguish between written and parol contracts. (*e*) For whether they be written or only spoken, they are, in law, if not sealed, equally and only parol contracts. For some purposes, and especially by the requirements of the Statute of Frauds, the evidence of the contract must be in writing; and when it is in writing, some peculiar rules of law apply to it. (*f*.) But it is a mistake to rest upon this a legal

(*e*) “The law makes no distinction in contracts, except between contracts which are, and contracts which are not, under seal. I recollect one of the most learned judges who ever sat upon this or any other bench, being very angry when a distinction was attempted to be taken between parol and written contracts, and saying, ‘They are all parol,

unless under seal.’” Lord Abinger, C. B., in *Beckham v. Drake*, 9 M. & W. 92.

(*f*) And independently of the Statute, a familiar rule of judicial procedure forbids the contradiction by one sort of evidence of a state of things declared to exist by a higher sort. In this sense it is unquestionably true, as Lord Ellenborough said in *Hoare v. Graham*,

distinction between written and oral contracts; and from this mistake some confusion has arisen. (*g*)

The essentials of a legal contract, of which we shall now proceed to treat, are, first, the Parties, for we cannot conceive of a contract which has no parties; secondly, the Consideration, for this is, in legal contemplation, the cause of the contract; thirdly, the Assent of the Parties, without which there is in law no contract; and, fourthly, the Subject-Matter of the Contract, or what the parties to it propose as its effect.

3 Camp. 57, that to incorporate with a written contract an incongruous parol condition is contrary to first principles.

(*g*) *Wilmot, J.*, *Pillans v. Van Mierop*, 3 Burr. 1670 – 71, and *Parker, J.*, *Stackpole v. Arnold*, 11 Mass. 27, 30, recognize three classes of contracts, but are

not sustained by the authorities. See *Rann v. Hughes*, 7 T. R. 350, note; *Thacher v. Dinsmore*, 5 Mass. 299, 301; *Cook v. Bradley*, 7 Conn. 57; *Union Turnpike Co. v. Jenkins*, 1 Caines's R. 386.

BOOK I.

OF PARTIES TO A CONTRACT.

CHAPTER I.

CLASSIFICATION OF PARTIES.

PARTIES may act independently and severally, or jointly, or jointly and severally.

They may act as representative of others, as

Agents,
Factors or Brokers,
Servants,
Attorneys,
Trustees,
Executors or Administrators,
Guardians.

They may act in a collective capacity, as

Corporations,
Joint-Stock Companies, or as
Partnerships.

They may be New Parties,

By Novation,
By Assignment,
By Indorsement.

They may be Parties disabled in whole or in part, as

Infants,
Married Women,
Bankrupts or Insolvents,

Non Compotes Mentis,
Drunkards,
Spendthrifts,
Seamen,
Aliens,
Slaves,
Outlaws,
Attainted,
Excommunicated.

These subjects we will proceed to consider separately.

[10]

CHAPTER II.

OF JOINT PARTIES.

Sec. I.—*Whether Parties are Joint or Several.*

WHEREVER an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. (*h*)

Whether the LIABILITY incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express; and where they are not express, upon the intention of the parties as gathered from all the circumstances of the case. (*i*)

(*h*) *Hill v. Tucker*, 1 Taunt. 7; *Hat-sall v. Griffith*, 4 Tyr. 487; *King v. Hoare*, 13 M. & W. 499, per *Parke*, B.; *English v. Blundell*, 8 C. & Payne, 332; *Yorks v. Peck*, 14 Barb. 644. — With respect to instruments under seal, it is said in *Shep. Touchstone*, 375, "If two, three, or more, bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be, joint only, and not several." And see *Ehle v. Purdy*, 6 Wend. 629. — If an instrument, worded in the singular, is executed by several, the obligation is a *joint and several* one; and those who thus execute it may be sued either separately or together. *Hemmenway v. Stone*, 7 Mass. 58; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Powell, J., Sayer v. Chaytor*, 1 Lutw. 695, 697; *Marsh v. Ward*, Peake, N. P. C. 130; *Clerk v. Blackstock*, Holt, N. P. C. 474; and see *Hall v. Smith*, 1 B. & Cress. 407. — But in *Slater v. Magraw*, 12 G. & Johns. 265, where (on the sale of a negro) the form of the covenant was, "I do hereby obligate to give the said

William Slater a good title for said boy when called on. *W. M. F. Magraw*, (seal.) *Security*: *Geo. H. Dutton*, (seal,)" — a demurrer to a count declaring on this as a joint and several covenant, was sustained, and the court held, that the covenant to convey the title was the covenant of *Magraw* alone; that the covenant of *Dutton* was a several covenant as surety that *Magraw* would make the title when called on for that purpose; and that therefore an action on the covenant to convey could not be maintained against them jointly. See also *De Ridder v. Schermerhorn*, 10 Barb. 638.

(*i*) *Wilde, J.*, in *Peckham v. North Parish in Haverhill*, 16 Pick. 274, 283. — In the following cases the liability was held to be *joint*: — *Wigmore and Wells's case*, 3 Leon. 206; *Wightman v. Chartman*, *Gouldsbrough*, 83; *Anonymous*, *Moore*, 260; *Coleman v. Sherwin*, 1 Salk. 137, 1 Show. 79; *Byers v. Dobey*, 1 H. Bl. 236; *Exall v. Partridge*, 8 T. R. 308; *Wathen v. Sandys*, 2 Camp. 640; *Forster v. Taylor*, 3 Camp.

It may be doubted, however, whether any thing less than express words can raise at once a joint and a several liability.

Where the obligation is joint and several, an ancient and familiar rule of law forbids it to be treated as several as to some of the obligors, and joint as to the rest. The obligee has the right of choice between the two methods of proceeding; but he must resort to one or the other exclusively, and cannot combine both; he must proceed either severally against each, or jointly against all. (*j*)

49; *Eaden v. Titchmarsh*, 1 Ad. & El. 691; *London Gas Light Co. v. Nicholls*, 2 C. & P. 365; *Phillips v. Bonsall*, 2 Binney, 138; In the following cases the liability was held to be *several*: — 39 H. 6, 9, pl. 15; *Bro. Abr. Covenant*, pl. 27; s. c. *Viner Abr. Covenant*, (M. a.) pl. 1 and 2; s. c. *Mathewson's case*, 5 Co. R. 22; *Brown v. Doyle*, 3 Camp. 51, *note*; *Gibson v. Lupton*, 9 Bing. 303; *Collins v. Prosser*, 1 B. & Cress. 682; *Hudson v. Robinson*, 4 M. & Sel. 475; *Smith v. Pocklington*, 1 Cr. & Jer. 445; *Fell v. Goslin*, 11 E. L. & E. 554; *Harris v. Campbell*, 4 Dana, 586; *McCready v. Freedly*, 3 Rawle, 251; *Ernst v. Bartle*, 1 Johns. Cas. 319; *Ludlow v. McCrea*, 1 Wend. 228; *Howe v. Handley*, 25 Maine, 116. In the following cases the liability was held to be *joint and several*: — *Constable v. Cloberry*, Pop. 161; *Burden v. Ferrers*, 1 Sid. 189; *Hankinson v. Sandilaus*, Cro. Jac. 322; *Linn v. Crossing*, 2 Rol. Abr. 148, *Obligation* (G); *Lilly v. Hodges*, 1 Stra. 553, 8 Mod. 166; *Robinson v. Walker*, 1 Salk. 393, 7 Mod. 153. The words there were, *convenient pro se et quolibet eorum*. But *Holt*, C. J., dissenting from the majority, thought this might be considered *joint* by reason of the word of agreement (*convenient*) being in the plural, and not being repeated in the singular, so as to express a distinct several promise. *Bolton v. Lee*, 2 Lev. 56; *Sower v. Bradfield*, Cro. Eliz. 422; *May v. Woodward*, Freeman, 248; *Enys v. Donnithorne*, 2 Burr. 1190; *Mansell v. Burrege*, 7 T. R. 352; *Bangor Bank v. Treat*, 6 Greenl. 207.

(*j*) *Streatfield v. Halliday*, 3 T. R. 782; *Cabell v. Vaughan*, 1 Wms. Saund. 291 f. n. 4; *Bangor Bank v. Treat*, 6 Greenl. 207. — In the case of a *joint and several* debt, judgment (without satisfaction) recovered against one of the

debtors, is no bar to an action against another. Per *Popham*, C. J., *Brown v. Wootton*, Cro. Jac. 74, cited by *Parke*, B., in *King v. Hoare*, 13 M. & W. 504. — But a judgment, though unsatisfied, recovered against one of two *joint* debtors, is a bar to an action against the other, or to an action against both. *Ward v. Johnson*, 13 Mass. 148; *King v. Hoare*, 13 M. & W. 494. — In *Robertson v. Smith*, 18 Johns. 484, which was the case of a solvent dormant partner, discovered after judgment obtained against the insolvent ostensible partner, *Spencer*, J., while holding the plaintiff's action to be barred, suggested that the court, on application, might be induced to *vacate* the former judgment. — But *Collins v. Lemasters*, 1 Bailey, 348; *Treasurers v. Bates*, 2 Bail. 362, and *Sheehy v. Mandeville*, 6 Cranch, 253, are *contra*. In *King v. Hoare*, 13 M. & W. 494, *Sheehy v. Mandeville* was cited, but *Parke*, B., giving the judgment of the court, observed, "During the argument, a decision of the Chief Justice *Marshall*, in the Supreme Court of the United States, was cited as being contrary to the conclusion this court has come to; the case is that of *Sheehy v. Mandeville*. We need not say we have the greatest respect for every decision of that eminent judge; but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar. *Ward v. Johnson*, 13 Tyng's Rep. 148." — Where one contracts in writing with three persons to give a bill of sale of two thirds of a vessel to two of them, and of one third to

The question whether the RIGHT under a contract is joint * or otherwise, enters more intimately into the nature of the contract, and therefore is of more importance; and it is at the same time of greater difficulty.

As a contract with several persons, for the payment to them of a sum of money, is a joint contract with all, and all the payees have therein a joint interest, so that no one can sue alone for his proportion; so, the designating of the share of each will not create such a severance of interest as to sustain a several action; but all must join in an action for the whole. (*k*) But if the contract contains distinct grants, or promises of distinct sums to distinct payees, they would then have several interests, and certainly may, perhaps must, bring separate actions. (*l*)

Where there are three or more obligees or promisees, the contract, if treated as joint by any, must be treated as joint by all. In no case can two sue together, leaving the other to seek his remedy upon *the same contract*, by himself. (*m*)

If a contract expressly, and in its very terms, joint *and several*, be made with divers persons, but for the payment of

the other, and, in pursuance of the contract, does convey two thirds; this is not a severance of the cause of action, and a suit may be maintained for the price against the whole. *Marshall v. Smith*, 15 Maine, 17.

(*k*) *Lane v. Drinkwater*, 5 Tyr. 40, 1 C. M. & Ros. 599; *Byrne v. Fitzhugh*, 5 Tyr. 54, 1 C. M. & Ros. 613.

(*l*) The master of a vessel covenanted with the several part owners and their several and respective executors, administrators, and assigns, to pay certain moneys to them and to their several and respective executors, &c., at a certain banker's, and in *such parts and proportions* as were set against their respective names. Upon this covenant an action was brought by the covenantees jointly. *Held*, on demurrer to the declaration, that the covenant was *several*, because otherwise no effect would be given to the words "several and respective executors," &c., and because the money was to be paid to the banker, not as an entire sum for him to make distributions, but in several proportions to the separate account of each part owner, thus making the interest of the cove-

nantees several. *Servante v. James*, 10 B. & Cress. 410. See also *Ford v. Bronaugh*, 11 B. Mon. 14.

(*m*) *Contra*, Bro. Abr. Covenant, 49. A man covenanted with twenty, and with each of them, to make certain sea-banks; and by his not doing it the land of two was overflowed to their injury. *Held* by the court that these two could have their action of covenant without the others. "*Quære*," adds Brooke, "for it seems that each should bring an action by himself." The criticism of Brooke is undoubtedly well founded. It may be questioned, moreover, whether this case is authority even to give such a covenant the *legitimate* attributes of a *several* covenant. The case was cited in *Slingsby's case*, (according to the report of the latter in 2 Leon. 47.) There, A. B., and C., being parties respectively to an indenture tri-partite, wherein A. covenanted with B. and C., *et quolibet eorum*, that the land which he had conveyed to B. was discharged of all incumbrances, B. brought a several action of covenant; and the court held, notwithstanding the case from Brooke, that C. ought to have been joined.

a sum or the accruing of some other benefit to one of them only, all must join in a suit upon that contract; (*n*) because but one thing is to be done, and all have a legal interest in * the performance of that thing, although but one party has a beneficial interest. So, if there be in one instrument a covenant with A., and another separate and distinct covenant with B., and both are for the payment of a sum of money to A., A. cannot sue alone for this sum, but B. must join, because otherwise the payer might be subjected to suits by both parties. (*o*) In general, all contracts, whether express, or implied and resulting from the operation or construction of law, are joint, where the interest in them of the parties for whose benefit they are created, is joint, and separate where that interest is separate. But the interest which is thus important as a criterion, is an interest in *the contract*, and not in any sum of money, or other benefit, to be received from it. It is a strictly legal and technical interest, created *by* the contract, and does not depend upon the condition or state of the parties aside from the contract. (*p*)

A covenant which is single in its nature, or, which is for one and the same cause, and so, in strict propriety, may be called one covenant and not a cluster of covenants, can never be *joint and several* in respect to the covenantees. In other words, this class of covenants does not exist with respect to the parties plaintiff in an action for covenant broken; it never lies in the option of the covenantees to say whether they shall sue for the breach, jointly or severally. They must sue jointly if they can. (*q*) The circumstances of each case,

(*n*) *Anderson v. Martindale*, 1 East, 497.

(*o*) *Ibid.*

(*p*) *Anderson v. Martindale*, 1 East, 497; *English v. Blundell*, 8 C. & Payne, 332; *Lord Denman*, *Hopkinson v. Lee*, 6 Q. B. 971, 972.

(*q*) *Slingsby's case*, 5 Co. R. 19 *a*; *Spencer v. Durant*, Comb. 115; *Eccleston v. Clipsham*, 1 Saund. 153; *Petrie v. Bury*, 3 B. & Cress. 353; *Scott v. Godwin*, 1 B. & Pul. 67, 71; *Gibbs*, C. J., *James v. Emery*, 5 Price, 533; *Foley v. Addenbrooke*, 4 Queen's Bench, 197; *Pollock*, C. B., *Parke*, B., and *Rolfe*, B., *Keightley v. Watson*, 3 Exch. 721, 723, 726.—Possibly, an exception to this rule

is to be found in the case where the *words* of the covenant are joint and several as to the covenantees, while their *interest* is several. In such a case the law, perhaps, allows the covenantees, who, upon any principle of construction, clearly may sue separately, the liberty to sue jointly. See *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Withers v. Bircham*, 3 B. & Cr. 256; *Slingsby's case*, 5 Co. R. 19 *a*; *Rolls v. Yate*, *Yelverton*, (Metcalf's ed.) 177, note.—On the supposition that this exception exists, both rule and exception might be expressed by stating the proposition thus:—It is not possible, *by any mere words of joinder and sever-*

and the situation and relation of the parties, and the nature

ance, to give the covenantees the election to sue separately or together.

By what principles it is to be determined whether a given contract is joint, or joint and several, or several, is a matter in regard to which the authorities are in a state of some confusion. A doubt, suggested by Mr. Preston in his edition of the *Touchstone*, and taken up by the Court of Exchequer, has at once shaken the received opinion, and occasioned at least apparent conflict between that court and the Queen's Bench. It is evident that a covenant may be considered with reference either to the covenantors or covenantees. If A. B., and C., covenant with X., Y., and Z., two distinct questions arise. Shall X., Y., and Z., join, or not, as plaintiffs? Shall A., B., and C. be joined, or not, as defendants? There appears no reason for doubting that the words of joinder or severalty determine the answer of the second of these questions. The covenant, with respect to the covenantors, may belong to either one of the three classes of joint, several, and joint and several, just as the parties have chosen to say in the covenant that it shall. The language of severalty or joinder, and not the interest, is then the test of the quality of the covenant *quoad* the *covenantors*. *Enys v. Donnithorne*, 2 Burr. 1190. As regards the joinder of the *covenantees* there is nothing *a priori* to prevent the existence of the same three classes to choose amongst; viz., the class where they must sue jointly, that where they must sue separately, and that where it is their option to sue either jointly or severally. But the proposition stated above, if true, obviously removes the third alternative. The *covenantees* either must join or must sever. Thus the inquiry is narrowed to this, *By what means* is it to be determined in a given case whether they must or must not sue jointly? And this is the point, and, as it would seem, the only point upon which there is a real conflict of authorities. A series of cases, received without question by the text-writers, went upon the principle that the *interest* which the covenantees take by the covenant, *quite irrespective of words of severalty or joinder*, is in all cases the decisive test. *James v. Emery*, 5 Price, 529, 8 Taunt. 245; *Withers v. Bircham*, 3 B. & Cress. 254;

Servante v. James, 10 B. & Cress. 410; *Lane v. Drinkwater*, 5 Tyr. 40, 1 C. M. & Ros. 599. But Mr. Preston denied the correctness of the rule as stated. "On the subject of joint and several covenants, that eminent lawyer, Sir *Vicary Gibbs*, assumed that covenants must necessarily be joint or several according to the interest. The language was, 'Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint; and where the interest is joint, the action must be joint, although the covenant, in language, purport to be joint and several.' *James v. Emery et al.* 5 Price. 533. With great deference, however, the correct rule is, that, by express words clearly indicative of the intention, a covenant may be joint, or joint and several, to or with the covenantors or covenantees, notwithstanding the interests are several. *Salk.* 393; 2 Roll. Abr. 419, [possibly should be 149; see 6 Queen's Bench, 971, note.] So they may be several, although the interests are joint. But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect. *Slingsby's case*, 5 Rep. 19; 3 Ch. R. 126; 5 T. R. 522; *Southcote v. Hoare*, 3 Taunt. 89; 1 Wood, 537; 2 Burr. 1190;" *Shep. Touchstone*, by Preston, 166. In *Sorsbie v. Park*, 12 M. & W. 146, Lord *Abinger* said, "I think the rule is plain and certain, and requires no authority; it is correctly stated by Mr. Preston in the passage in *Shep. Touch.* 166, which Mr. *Temple* cited. Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versa*. But there is no rule to say that words, which are expressly a joint covenant by [to] several persons, shall be construed as a several covenant unless there is something to lead to that construction." In this view *Parke*, B., concurred,

of the consideration, are all to be looked into, to ascertain

(p. 158.) "The rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint." — In *Foley v. Adenbrooke*, 4 Queen's Bench, 197, (which was decided a little before *Sorsbie v. Park*, but was not referred to in that case,) the doubt suggested by Preston was not agitated. — *Mills v. Ladbroke*, 7 M. & Gran. 218, [1844] was an action brought by a single plaintiff. It was contended that the covenant on which the action was founded, although several in terms ought to be treated as joint by reason of the interest of the covenantees, who were engaged in a partnership transaction. *Tindal, C.J.*, in overruling the objection, thus adverted to the doctrine of the Court of Exchequer:—"The covenant, therefore, entered into by the defendant, as representing Kingscote, with the shareholders, is, in point of form, not a covenant with all the covenantees jointly, but a several covenant with each. And we think this is so clearly the case, that if the general rule as laid down by Sir *Vicary Gibbs*, in *James v. Emery*, is qualified according to the suggestion of Mr. Preston, in a note to *Sheppard's Touchstone*, p. 166, which was adopted by the Court of Exchequer in the case of *Sorsbie v. Park*, all reference to the nature of the plaintiff's interest would be unnecessary. But, assuming on the authority of the several cases referred to in the argument, that the unqualified rule of law is, that the action shall follow the nature of the interest of the covenantees, without regard to the precise form of the covenant, so that the action must be joint where the interest in the subject-matter of the covenant is joint, and several where the interest of each covenantee is a several interest, we think, upon reference to the deed itself, the plaintiff has such several interest in the subject-matter as will enable him to sue alone on this several covenant." [His lordship then proceeds to examine the language of the deed.] It was not long before *Hopkinson v. Lee*, 6 Q. B. 964, [1845] afforded an opportunity for the expression of the opinion of the Court of Queen's Bench. This was an action by a trustee upon

articles of agreement under seal, to which the defendant and T. were parties, of the one part, and the plaintiff and his *cestui que trust*, parties of the other part. The agreement recited a loan by the plaintiff to E. of money in the hands of the plaintiff, belonging to the *cestui que trust*; in consideration of which defendant and T. covenanted severally and respectively "with and to [the plaintiff] his executors, administrators, and assigns, and also as a distinct covenant with and to [the *cestui que trust*] her executors, administrators, and assigns," that they, the covenantors, would pay, or cause to be paid, interest at 5 per cent. per annum on the money lent to E. It was held that the *cestui que trust* ought to have been joined as a plaintiff. Lord *Denman*, in the opinion, referred with approbation to the rule that words of severalty do not prevent a covenant from being joint where the interest is joint, and said that Mr. Preston's exception was not grounded on any judicial authority. His lordship added, (p. 971) "We think there is no ground for Mr. Preston's apprehension that words perfectly plain and unambiguous, confining the contract expressly to one person, and excluding all others from its operation, will be strained by the law so as to comprehend those whom it took pains to exclude. The true explanation of the rule is rather this: that the whole covenant, taken together, binds to both covenantees, and not to either of them alone, though separately named in some of its words, by reason of the joint interest in the subject-matter, of the action, appearing on the face of the deed itself. Such being the state of the authorities, a special case was reserved from the assizes for the Court of Exchequer, where certain persons, with whom a covenant had been made, sued the covenantors upon it. The deed, being fully set out, was found to make a covenant with the plaintiffs, for themselves and others; and in Michaelmas term, 1843, the court held, in strict conformity with all the cases, that a nonsuit ought to be entered, because those others had not been joined as plaintiffs in bringing the action, though the covenant declared on was, in its terms, made with them alone. But the plaintiff here places his whole reliance on some dicta which fell from the late Chief Baron and from *Parke, B.*, appli-

who is really interested, and who has sustained the damage

cable, not to that case, but only to the converse of it, which were represented as at variance with the old law. Unluckily, no reference was made to *Anderson v. Martindale*, as the court, justly thinking the general rule too clear for argument, stopped the learned counsel who supported it. Lord *Abinger* thought the rule plain and certain, and that it required no authority: 'it is correctly stated by Mr. Preston:' he then cites the rule with the exception. *Parke*, B., also thinks the correct rule is laid down by *Gibbs*, C. J., in *James v. Emery*, (5 Price, 533,) with the qualification stated by Mr. Preston. These learned judges could not intend to overrule *Anderson v. Martindale*, (1 East, 497,) which was not brought before them; nor, if they did, could we agree to be bound by their extra-judicially declaring such an intention where their decision itself pursued the doctrine of that case."—In *Bradburne v. Botfield*, 14 M. & W. 559, 572, [1845] the matter was thus left by Baron *Parke*:—"There is no occasion to refer to the cases relating to the rule of construction, as to covenants being joint or several, according to the interest of the parties, which is perfectly well established. In the case of *Sorsbie v. Park*, (12 M. & W. 146,) Lord *Abinger* and myself, on referring to the established rule, as laid down by Lord Chief Justice *Gibbs*, in the case of *James v. Emery*, (2 Moore, 195,) approved of Mr. Preston's qualification and explanation of it in his edition of the *Touchstone*, 166, namely, that, if the language of the covenant was capable of being so construed, it was to be taken to be joint or several, according to the interest of the parties to it. Mr. Preston adds, that the general rule proposed by Sir *Vicary Gibbs*, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by any intention, however express, and I consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one. I mention this, because the Court of Queen's Bench, in the case of *Hopkinson v. Lee*, (14 Law

J. (N. S.) Q. B. 104,) have supposed that Lord *Abinger* and myself had sanctioned some doctrine at variance with the case of *Anderson v. Martindale*, and *Slingsby's* case, which it was far from my intention, and I have no doubt from Lord *Abinger's*, to do; it being fully established, I conceive, by those cases, that one and the same covenant cannot be made both joint and several with the covenantees. It may be fit to observe, that a part of Mr. Preston's explanation, that by express words a covenant may be joint and several with the covenantors or covenantees, notwithstanding the interests are several, is inaccurately expressed; it is true only of covenantors, and the case cited from *Salkeld*, p. 393, relates to them; probably Mr. Preston intended no more, and I never meant to assent to the doctrine that the same covenant might be made, by any words, however strong, joint and several, where the interest was joint; and it is this part, I apprehend, of Mr. Preston's doctrine, to which the Court of Queen's Bench objects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench."—Afterwards [1849] came the case of *Keightley v. Watson*, 3 Exchequer, 716. That was an action of covenant by one plaintiff on a deed executed by one Dobbs of the first part, the plaintiff of the second part, and the defendants of the third part. The deed, after reciting that Dobbs had agreed to purchase certain land of the plaintiff, which same land Dobbs had agreed to sell to the defendants, stated that it was thereby covenanted by each party thereto, that Dobbs should sell, and the defendants should purchase, the said land, at 7,335*l.* 900*l.* to be paid upon the execution of the deed, and 6,435*l.* on the 27th November, 1851. The deed then contained the following covenant:—"And the defendants for themselves, their heirs, &c., hereby covenant, with the said plaintiff, his executors, &c., and, as a separate covenant, with the said Dobbs, his executors, &c., that they, the said defendants, and their heirs, &c., shall, on performance of the covenant and agreement hereinbefore contained, on the part of the said Dobbs, pay to the said plaintiff, his executors, &c., or to the said Dobbs, his executors, &c., in case the

arising from a breach of the contract, and whether such damage was joint or several. (r)

(r) In *Windham's case*, 5 Co. R. 7, it is stated that joint words in a grant are sometimes taken severally:—1. In respect of the several interests of the grantors; as if two tenants in common, or several tenants, join in a grant of a rent-charge, yet in law this grant shall be several, although the words are joint. 2. In respect of the several interests of the grantees, &c. 19 H. 6, 63, 64. A warranty made to two of certain lands shall enure as several warranties, in respect that they are severally seized, the one of part of the lands, and the other of the residue in severalty. 6 E. 2; Cove-

nant, Br. 49. [But this case does not seem to be law, See note (m) *supra*.] A joint covenant taken severally in respect of the several interests of the covenantees. Vide 16 Eliz. Dyer, 337, 338, [*infra* note (c)] between Sir Anthony Cook and Watton, a good case. 3. In respect that the grant cannot take effect but at several times. 4. In respect of the incapacity and impossibility of the grantees to take jointly. 5. In respect of the cause of the grant, or *ratione subjectæ materiæ*. 6. *Ne res destruat et ut evitetur absurdum*.

said plaintiffs, his executors, &c., shall then have been paid his or their purchase-money, payable, &c., the sum of 6,435*l.*, being the remainder of the said purchase-money, on or before the 27th November, 1851. And further, that the said defendants, their heirs, &c., shall in the mean time, and until the whole of the said sum of 6,435*l.* shall be paid off, pay to the said plaintiff, his executors, &c., interest on so much of the purchase-money as shall from time to time remain unpaid, at the rate of 5*l.* per cent. per annum, from the date of these presents," &c. *Held*, that plaintiff might properly sue *alone* for interest on the unpaid portion of the purchase-money, the covenant being several. *Pollock*, C. B., said, "I am of opinion that in this case the plaintiff is entitled to the judgment of the Court. I consider that the inquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule—a rule which I am by no means willing to break in upon—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several, if the interest be several. On the other hand, if it be in its terms *unmistakeably* joint, then, although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construction. What then, in this case, did the parties mean? The words of the covenant are, 'And

the said R. Watson, H. Watson, and J. Smith, for themselves, their heirs, executors and administrators, hereby covenant with the said W. T. Keightley, his executors, administrators, and assigns, and as a *separate* covenant with the said A. A. Dobbs, his executors, administrators, and assigns, that they' will do so and so. If I am to put a construction upon that, I should say that it is intended to be a several or separate covenant. In the case of *Hopkinson v. Lee* it seems to have been understood at one time by this Court, that there were joint words. There are certainly none. But the nature of the interest, upon looking into that particular case, may possibly justify that decision. The words of this instrument are several, and its terms disclose a several interest; the covenant, therefore, must be construed according to the words, as a several covenant; and it appears to me that the words used by the parties were intended to create such a covenant. I think, therefore, that the plaintiff is entitled to sue *alone*."—*Parke*, B., in the course of an opinion of considerable length, said, "the rule that covenants are to be construed according to the interests of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If

The nature, and especially the entireness, (s) of the consideration is of great importance in determining whether the promise be joint or several; for if it moves from many per-

(s) *Chanter v. Leese*, 5 M. & W. 698, 701; 1 Roll. Abr. 31, pl. 9.

there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest. I apprehend that no case can be found at variance with that rule, unless *Hopkinson v. Lee* may be thought to have a contrary aspect. During the course of the argument in *Bradburne v. Botfield*, I certainly was under the impression, from reading the case of *Hopkinson v. Lee*, that there were in that case words capable of such a construction as to make the covenant a joint covenant. If that had been so, then the words subsequently introduced would not have made it several, unless there had also been an interest in respect of which it could be several, according to the rule referred to by the Lord Chief Baron, as laid down in *Slingsby's case*, that it is not competent to the court to hold the same covenant joint or several at the option of the covenantee." — *Rolfe, B.*, gave the following opinion, which is cited at length as containing within a small compass a clear and able review of the whole subject: — "I am of the same opinion. It seems to me that the question turns entirely upon the rule, as stated by my Brother Parke, which was distinctly laid down by this court in the cases cited, and in which I fully concur. It appears to me, that Mr. Preston's suggestion was perfectly well founded, that the rule in *Slingsby's case* was not a rule of law, but a mere rule of construction. From that case it appears, that, if a covenant be *cum quolibet et qualibet eorum*, that may be either a joint or several covenant, and it will depend upon the context whether it is to be taken as a joint or several; but it cannot be both. The rule given in *Slingsby's case* is not very satisfactory to my mind, namely, with regard to the difficulty which arises as to the proper person to recover damages. If a party choose to enter into a covenant which creates such a difficulty, I do not see what the court has to do with it. It is clear that parties can so contract by separate deeds; why, then, should they not be able equally to do so by separate covenants in the same deed? If they

so word one covenant as to make it a joint and separate covenant, had it not been otherwise decided, I confess I should have seen nothing extraordinary in holding that if they choose so to contract as to impose upon themselves that burden, and state it to be both joint and several, the court ought so to construe it. But *Slingsby's case* has laid down the opposite rule. I take it, that from that time the rule has always been — whether distinctly expressed or not, it is not necessary to consider — but the rule has been that you are to look and see from the context what the parties meant. Applying that rule here, I see no doubt about the question. They have said, in terms, that it is to be a separate covenant. According to the other construction, if *Dobbs* had satisfied *Keightley*, and *Dobbs* had died, *Keightley* might have to sue for the money coming to *Dobbs*, and *vice versa*; or, suppose *Dobbs* had not satisfied *Keightley*, and *Keightley* had died, *Dobbs* would have had to sue for the money coming to *Keightley's* representatives. The parties have expressed themselves in words showing it was to be a separate covenant with each, and I think we should so hold it; consequently the plaintiff is entitled to our judgment." *Platt, B.*, concurred in the judgment. — From the whole we may gather that the Court of Exchequer maintain the general principle that it is competent to the parties to make the contract, by express words, what they please, as well with respect to the joinder of parties as with respect to any other legal quality of the contract. The rule, carried to its extent, would permit the making of a covenant *joint*, or *several*, or *joint and several*, as to the covenantors; and *joint*, or *several*, or *joint and several*, as to the covenantees. But the Court of Exchequer add that the rule is to be taken with this qualification, namely, that one of the six cases above enumerated is excluded by the doctrine (settled perhaps, on authority rather than principle,) that no covenant can be *joint and several* as to the covenantees. Of course it is not to be doubted that in this respect all contracts, whether under seal or not, are governed by the same principles.

sons jointly, the promise of repayment is joint; (t) but if * from many persons, but from each severally, there it is several. (u) Where the payment is in the first place of one sum *in solido*, and this is afterwards to be divided among the payees, there, generally, the interest of the payees is joint; (v) but where the first payment is in several sums among the several payees, there, generally, their interest is several. (w) So if a sum *in solido* is advanced to one by many persons, the promise of repayment is a promise to all jointly; (x) but if several sums are advanced separately by each, there the promise is to each severally. (y) And if the several persons raise the sum by separate and distinct contribution; but, when raised, it is put together and advanced as one sum, there the promise of repayment is to all jointly. (z) Both a joint obligation or right, and a several obligation or right, may co-exist; for there may arise from the same contract, one joint duty to all, and also several duties to each of the parties. (a)

In analogy with the rule in the case of contracts, it is well established, that there can be no joint action for an injury, unless that injury be a joint injury to the plaintiffs. Therefore husband and wife cannot sue jointly for assault and battery of them, or for slander of them. (b)

Whatever rule be adopted as the leading principle of construction, the question whether the right created by a contract is joint or several, must be left in any particular instance so much to mere authority, that we close the subject with a reference to the decisions collected in the note. (c)

(t) *Ivans v. Draper*, 1 Roll. Abr. 31, pl. 9; *Winterstoke Hundred's case*, Dyer, 370, a. But see *Jones v. Robinson*, 1 Exch. 454 [*infra*, note (c)].

(u) *Bell v. Chaplain*, *Hardres*, 321.

(v) *Lane v. Drinkwater*, 5 Tyr. 40; *Byrne v. Fitzhugh*, 5 Tyr. 54.

(w) *Thomas and ———*, *Styles*, 461.

(x) *May v. May*, 1 C. & Payne, 44. Money advanced on the *joint credit* of two parties may be recovered by them in a joint action against the person for whose benefit it was paid. *Osborne v. Harper*, 5 East, 225.

(y) *Brand v. Boulcott*, 3 B. & Pul. 235.

(z) *May v. May*, 1 C. & Payne, 44.

(a) *Story v. Richardson*, 6 Bing. N.

C. 123; *Peckham v. North Parish in Haverhill*, 16 Pick. 274.

(b) 9 Ed. 4, 51; *Cole v. Turner*, 6 Mod. 149; *Gazinsky et ux. v. Colburn*, decided, March T., 1853, Suffolk Co. Mass. (not yet reported.)

(c) It is attempted in this note to collect at least the more important cases in which the question of the propriety of the joinder of plaintiffs has been passed upon. These cases fall, it is evident, within one of four classes:—Where a joint action was held properly brought—where it was held that a several action should have been joint—where a several action was held properly brought—where it was held that a joint action should have been several.—

SECTION II.

OF SOME INCIDENTS OF JOINDER.

PARTIES are not said to be joint in law, merely because they are connected together in some obligation or some interest which is common to them both. They must be so connected as to be in a manner identified. They have not several and respective shares, which being united make a whole; but these together constitute one whole, which, whether it be an interest or an obligation, belongs to all. Hence arises an implied authority to act for each other, which is in some cases carried very far. Thus, if several plaintiffs sue for a joint demand, and the defendant pleads in bar an accord and

1. *Where a joint action was held properly brought.*

WAKEFIELD & BINGLEY v. BROWN, 9 Q. B. 209. Covenant. Bingley, being owner of a term of sixty-one years, granted an annuity to Samuel W., and for securing payment, assigned the term (wanting one day,) to Robert W. By indenture, reciting these facts, Robert W., at the request of Samuel W. and of Bingley, demised, and Bingley demised and confirmed the premises to Sophia B., at a rent payable to Samuel W., while the premises remained subject to the annuity, and afterwards to Bingley. Sophia B. covenanted to and with Samuel W. and Robert W., and their respective executors, &c., and also with and to Bingley, his executors, &c., to pay the rent, while the premises were subject to the annuity, to Robert [sic] W., and afterwards to Bingley, and also to make certain repairs. The action was upon the covenant to repair. *Held*, on demurrer, that Samuel W. being dead, Robert W. and Bingley could sue jointly. — ROSE v. POULTON, 2 B. & Ad. 822. Covenant. Demurrer. The covenant declared upon was, in terms, with the plaintiffs and G., *jointly and severally*. G. was also one of the covenantors, but was dead at the time of the bringing of the action. The court held that whether or not one of the covenantees could, if he had chosen, have sued separately, the action, as brought, was well maintainable. —

PEASE v. HIRST, 10 B. & Cress. 122. A., wishing to obtain credit with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300*l*. Upon two of the partners retiring from the banking-house, a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. *Held*, that the action was well brought in the name of the surviving members of the old firm. — KITCHIN v. BUCKLEY, T. Raym. 80; 1 Lev. 109; s. c. 1 Sid. 157. Nom. Kitchin v. Compton. Covenant for repairs against lessee for years. One Randal demised the tenement to the defendant, and afterwards granted a moiety of the reversion to Kitchin, and afterwards the other moiety to Knight. Kitchin and Knight brought this action jointly. After verdict for the plaintiffs, it was moved in arrest of judgment, that the plaintiffs, being tenants in common, ought not to join. But the court held that the action was properly brought, and said, "this is a personal action merely, in which tenants in common *may join*." — VAUX v. DRAPER, Styles, 156, 203; 1 Rolle, Abr. 31, pl. 9. Assumpsit. The several cattle of the two plaintiffs having been distrained, defendant, in consideration of 10*l*. paid to him by the plaintiffs, promised to pro-

satisfaction with one of the plaintiffs, but without any allegation that the other plaintiffs had authorized the accord and satisfaction, the plea is nevertheless good. (*d*) For a release of a debt, or of a claim to damages, by one of many who hold this debt or claim jointly, is a full discharge of it, and this whether they hold this debt or claim in their own right, or as executors or administrators. (*e*) This has been extended to the case where the release is given by one of joint plaintiffs, who, although a party to the record, is not a party in interest, but whose name the actual parties in interest were obliged to use with their own in bringing the action. (*f*) Nevertheless, if in such a case the party taking the release, and pleading it in bar, is aware that the party giving it had no interest in the claim released, the court would disregard the release; (*g*) and upon such facts as these the court have ordered the release to be given up and cancelled. (*h*)

(*d*) *Wallace et al. v. Kensall*, 7 M. & W. 264.

(*e*) *Bac. Abr. Release*, D. E.; *Jacomb v. Harwood*, 2 Ves. Sen. 265; *Murray v. Blatchford*, 1 Wend. 583; *Napier et al. v. McLeod*, 9 Wend. 120; *Decker v. Livingston*, 15 Johns. 479; *Pierson et al. v. Hooker*, 3 Johns. 68; *Austin et al. v. Hall*, 13 Johns. 286; *Bulkley et al. v. Dayton*, 14 Johns. 387; *Bruen v. Marquand*, 17 Johns. 58; *Hal-*

sey et al. v. Fairbanks, 4 Mason, 206; *Tuckerman v. Newhall*, 17 Mass. 581; *Wiggin v. Tudor*, 23 Pick. 444.

(*f*) *Wilkinson et al. v. Lindo*, 7 M. & W. 81; *Gibson v. Winter*, 5 B. & Ad. 96.

(*g*) *Gram et al. v. Cadwell*, 5 Cow. 489; *Leph v. Leph*, 1 B. & P. 447.

(*h*) *Barker et al. v. Richardson*, 1 Y. & J. 362.

cure the cattle to be redelivered to them. *Held*, on motion in arrest of judgment, that the joint action was good. *Rolle*, C. J., said, "The consideration given is entire, and cannot be divided, and there is no inconvenience in joining the action in this case; but if one had brought the action alone, it might have been questionable. *Jerman*, J., dissented, and thought several promises should be intended.

American Cases.—*SMITH v. TALLCOTT*, 21 Wend. 202. In an agreement under seal for the sale of lands, husband, wife, and trustee of the wife, were parties of the first part. The trustee did not execute the deed—though, by an indorsement on the back (under seal) he bound himself to do what should be necessary on his part to carry the contract into effect. *Held*, that an action against the parties of the second part

were properly brought in the joint names of husband, wife, and trustee.—*PEARSON v. PARKER*, 3 N. H. 366. Plaintiffs, being sureties for defendant, discharged the debt, in part, with money raised upon the joint note of plaintiffs, and in part with their joint note given directly for the residue. *Held*, that their action against the principal debtor was well brought jointly.—*WRIGHT v. POST*, 3 Conn. 142. Twenty persons, desirous to support a public right of fishery, entered into an agreement to defend such right through a trial at law, each promising to pay his proportion of the expense to such of them as should be sued for occupying the fishery. Three of them were sued jointly, and, after an unsuccessful defence, each paid from his private funds one third part of the execution. *Held*, that these three could maintain a joint action against a

If two or more are jointly bound, or jointly and severally bound, and the obligee releases to one of them, all are discharged. (i) Formerly a very strict and technical rule was applied to these cases; thus, where an action was brought against one of three who were bound jointly and severally, a plea in bar that the seal of one of the others was torn off was held good. And where three were bound jointly and severally, and the seals of two were eaten off by rats, the court inclined to think the obligation void against all. (j) But if the seals had remained on until issue were joined, their removal afterwards would not have avoided the bond. (k)

Where a technical release, that is, a release under seal, is given to one of two joint debtors, and the other being sued, pleads the joint indebtedness and the release, it is no answer to say that the release was made at the defendant's request, and in consideration that he thereupon promised to remain liable for the debt, and unaffected by the release; for this

(i) Co. Lit. 232 a; Bac. Abr. Release, G.; Vin. Abr. Release, G. a; Dean v. Newhall, 8 T. R. 168; Hutton v. Eyre, 6 Taunt, 289; Lacy v. Kynaston, 1 Ld. Raym, 690; S. C. 12 Mod. 551; Clayton v. Kynaston, Salk. 574; Milliken v.

Brown, 1 Rawle, 391; Johnson v. Collins, 20 Ala. 435.

(j) Bayly v. Garford, March, 125; Seaton v. Henson, 2 Show. 29.

(k) Nichols v. Haywood, Dyer, 59, pl. 12, 13; Michaell v. Stockworth, Owen, 8.

fourth, to recover his twentieth part of the expense incurred; the joint liability of the plaintiffs, coupled with defendant's promise, and not the payment of the money, being the cause of action.—HAUGHTON v. BAYLEY, 9 Iredell, 337. The two plaintiffs, each out of his own stock, delivered goods to defendant, to be peddled, and took a bond, payable to themselves jointly, for the faithful accounting therefor. *Held*, that they could maintain a joint action upon the bond, notwithstanding their several interests. See also Doe d. Campbell et al. v. Hamilton, 13 Q. B. 977; Beer v. Beer, 9 E. L. & E., 468; Magnay v. Edwards, 20 E. L. & E., 264; Arden v. Tucker, 4 B. & Ad. 815; Powis v. Smith, 5 B. & Ald. 850; Wallace v. McLaren, 1 M. & Ry. 516; Townsend v. Neale, 2 Camp. 190; Osborne v. Harper, 5 East, 225; Midgley v. Lovelace, Carth. 289; Yate v. Roules, 1 Bulst. 25; Clement v. Henley, 2 Rol. Abr. 22, (F.) pl. 2; Parker v. Gregg, 3 Foster, 416; Saunders v. Johnson, Skinner, 401.

2. In the following cases it was held that a several action should have been joint.

LUCAS v. BEALE, 20 Law Jour. (N.S.) C. P. 134; 4 E. L. & E., 358. Assumpsit. The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, "on behalf of the members of the orchestra," to continue their services, provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest. *Held*, that the contract was joint, and that he could not recover.—LOCKHART v. BARNARD, 14 M. & W. 674. Assumpsit. A handbill, relating to a stolen parcel, offered a reward to "whoever should give such information as should lead to the early apprehension of the guilty parties." The information was communicated first by plaintiff to

would be a parol exception to a sealed instrument. (l) This being the reason, it should follow that only a release under seal should have this effect; and the weight of authority is certainly and very greatly in favor of this limitation. (m) It has, however, been held in this country, that a release which is not under seal, to one of many joint debtors, of his share or proportion of the debt, operates in law as a full discharge of all. (n) But though the word release be used, even under seal, yet if the parties, the instrument being considered as a whole and in connection with all the circumstances of the case and the relations of the parties, cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release; (o) for a general covenant not to sue is not itself a release of the covenantee, but is so construed by the law to avoid circuitry of action; and a covenant not to sue one of many, who are jointly indebted, does not discharge one who is a joint debtor with the covenantee, nor in any way affect his obligation. (p)

(l) *Brooks v. Stuart*, 9 Ad. & El. 854; *Parker v. Lawrence*, Hob. 70.

(m) *Shaw v. Pratt*, 22 Pick. 305; *Walker v. McCulloch*, 4 Greenl. 421; *Lunt et al. v. Stevens*, 24 Maine, 534; *Harrison v. Close et al.* 2 Johns. 448; *Rowley v. Stoddard*, 7 Johns. 210.

(n) *Milliken v. Brown*, 1 Rawle, 391.

(o) *Solly v. Forbes*, 2 Brod. & Bing. 46; *McAllester v. Sprague*, 34 Maine, 296.

(p) *Lane et al. v. Owings*, 3 Bibb, 247; *Shed v. Pierce*, 17 Mass. 628; *Couch v. Mills*, 21 Wend. 424; *Rowley v. Stoddard*, 7 Johns. 209; *McLellan v. Cumberland Bank*, 24 Maine, 566; *Bank of Catskill v. Messenger et al.* 9 Cow. 37; *Durell v. Wendell et al.* 8 New Hamp. 369; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Lancaster v. Harrison*, 6 Bing. 731; *S. C.* 4 M. & P. 561; *Dean v. Newhall*, 8 T. R. 168.

C. in conversation, afterwards to a constable by plaintiff and C. jointly. *Held*, that C. ought to have joined in the action for the reward.—*HOPKINSON v. LEE*, 6 Q. B. 964. [For an abstract of this case, and for the comments made upon it by the Court of Exchequer, see note (q) *supra*.]—*BYRNE v. FITZHUGH*, 5 Tyr. 54, 1 Crompt. Mees. & Ros. 613. Before *Patteson, J.*, and *Gurney, B.* The agreement of defendants was that, in consideration of plaintiff and B. using their endeavors to charter ships and procure passengers on board of them, and not engaging with any other emigrant broker, they, the defend-

ants, undertook to pay plaintiff and B. a commission of 5*l.* per cent. on the amount of the net passage-money made by the ships, one half to be paid to plaintiff, and the other half to B.; *Lane v. Drinkwater* being cited, *held*, that plaintiff, suing without B., should be nonsuited.—*HATSALL v. GRIFFITH*, 4 Tyr. 487. A broker was employed to sell a ship belonging to three part-owners, two of whom communicated with him. To them he paid their shares of the proceeds of the sale; but, after admitting the third part-owner's share to be in his hands, refused to pay it to him without the consent of the

It may be added, though not strictly within the law of contracts, that the effect of a release of damages to one of two wrongdoers is the same as a release of debt; it is in its operation a satisfaction of the whole claim arising out of the tort, and discharges all the parties. (q) And in actions against two or more defendants for a joint tort, it has been said that damages should be assessed against all jointly for the largest amount which either ought to pay. (r) The true rule, however, must be, that the plaintiff is entitled to compensation for all the injury he has received, and for this there should be judgment against all who joined in doing the wrong. Several damages should not be assessed; but if they are, the plaintiff may elect which sum he will, and remitting the others, enter judgment for this sum against all. (s)

Only a voluntary release by the party injured, or claimant, has the effect of discharging all, although given but to one; for if one of two who owe jointly, either a debt or compensation for a wrong, be discharged by operation of

(q) *Brown v. Marsh*, 7 Verm. 320.

(r) Bull. N. P. 15; *Lowfield v. Bancroft*, 2 Str. 910; *Onslow v. Orchard*, 1 Str. 422; *Brown v. Allen et al.* 4 Esp. 158; *Austen v. Willward*, Cro. El. 860; *Smithson v. Garth*, 3 Lev. 324.

(s) *Johns et al v. Dodsworth*, Cro. Car. 192; *Walsh v. Bishop*, Cro. Car. 243; *Heydon's case*, 11 Co. 5; *Halsey et al. v. Woodruff*, 9 Pick. 555; *Rodney v. Strode*, Carth. 19.

other two. An action of assumpsit having been brought by the third part-owner for the share, *held*, that he was not entitled to recover.—*PETRIE v. BURY*, 3 B. & Cress. 353. Covenant; demurrer. The covenant declared upon was with the plaintiff and two others, for the use of a third party. The declaration averred that the two other covenantees had never sealed the deed. *Held*, notwithstanding, that as all *might* sue, all *must* sue, and that the declaration was bad.—*SOUTHCOTE v. HOARE*, 3 Taunt. 87. Covenant upon an indenture of three parts. *Held*, on demurrer, that a covenant with A. and B., and with every of them, is joint, though A. is party of the first part, and B. party of the second part, to the deed.—*GUIDON v. ROBSON*, 2 Camp. 302. Action by the drawer and payee of a bill of exchange against the acceptor. The bill sued upon was drawn payable to Guidon & Hughes, under which firm the

plaintiff traded. There was no one associated with him as partner; but he had a clerk named Hughes, and Lord Ellenborough *held* that such clerk should have been joined.—*SLINGSBY'S CASE*, 5 Co. 18, b.; s. c. 3 Leon. 160; s. c. 2 Leon. 47; s. c. Jenk. Cent. 262. R. B. by deed covenanted with four persons and their assigns, *et ad et cum quolibet eorum*, that he was lawfully and solely seized of a rectory. Two of the covenantees brought covenant against R. B., and *held* ill, because it was a joint covenant, and the others ought to have joined. The court said, "When it appears by the declaration, that every of the covenantees hath, or is to have, a several interest or estate, there, when the covenant is made with the covenantees, *et cum quolibet eorum*, these words, *cum quolibet eorum*, make the covenant several in respect of their several interests. As if a man by indenture demises to A. black acre, to B. white acre, to C. green

law, without the concurrence or consent of the party to whom the debt or compensation is due, he does not hereby lose his right to enforce this claim against those not discharged. (t) But it is said, that if the discharge by operation of law is at the instance of the plaintiff, or be caused by him, it then operates as a discharge of the other debtors. (u)

The legal operation of a release to one of two or more joint debtors may be restrained by the express terms of the instrument. For if a release containing such a proviso be pleaded by the other in bar to an action against both, a replication that the action is brought against both, only to recover of the other, is good. (v)

(t) Ward v. Johnson et al. 13 Mass. 152.

(u) Robertson v. Smith, 18 Johns. 459.

(v) Twopenny v. Young, 3 B. & Cr.

211; S. C. 5 D. & R. 261; Lancaster v. Harrison, 4 Moore & Payne, 561; S. C. 6 Bing. 726; Solly et al. v. Forbes et al. 2 Br. & Bing. 38; North v. Wakefield, 13 Q. B. 536.

acre, and covenants with them, and *quolibet eorum*, that he is lawful owner of all the said acres, &c., in that case in respect of the said several interests, by the said words, *et cum quolibet eorum*, the covenant is made several; but if he demises to them the acres jointly, then these words, *cum quolibet eorum*, are void, for a man, by his covenant, (unless in respect of several interests,) cannot make it first joint, and then make it several by the same or the like words, *cum quolibet eorum*; for, although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them, to make it joint or several at the election of several persons for one and the same cause, for the court would be in doubt for which of them to give judgment, which the law would not suffer, as it is held in 3 II. 6, 44, b." See also Bradburne v. Botfield, 14 M. & W. 559; Sorsbie v. Park, 12 M. & W. 146; Lane v. Drinkwater, 5 Tyr. 40, 1 C. M. & Ros. 599; English v. Blundell, 8 C. & P. 332; Decharms v. Horwood, 10 Bing. 526; Hill v. Tucker, 1 Taunt. 7; Anderson v. Martindale, 1 East, 497; Spencer v. Durant, Comb. 115; Thimblethorp v. Hardesty, 7 Mod. 116; Chanter v. Leese et al. 4 M. & W. 295; Wetherell v. Langston, 1 Exch. 634; Foley v. Addenbrooke, 4 Q. B.

197; Teed v. Elworthy, 14 East, 210; Scott v. Godwin, 1 B. & Pull. 67.

American Cases.—SWEIGART v. BERK, 8 S. & Rawle, 308. Seven of ten joint obligees brought an action (living the other obligees) against the obligor. *Held*, that it could not be maintained. *Semble*, an action could not have been maintained by one, although brought in respect of separate interest.—DOB v. HALSEY, 16 Johns. 34. Assumpsit by D. & D., partners, against H. M. being shown to be a member of the firm, *held*, that he ought to have been joined as plaintiff.—SIMS v. HARRIS, 8 B. Monr. 55. Debt on a penal bond. The bond was executed by the defendant in favor of the plaintiff and several others, as joint obligees. The plaintiff brought the action alone to recover the penalty. *Held*, that the action was not well brought. *Aliter*, if the action had been covenant on the bond; for in that case, so far as each of the obligees in the bond has a separate interest in the performance of its stipulations, the cause of action is several, and not joint. (See Pearce v. Hitchcock, 2 Comst. 388.)—TAPSCOTT v. WILLIAMS, 10 Ohio, 442. Where lands descended to coparceners, with warranty, and they were evicted before severance, it was *held* that one of them could not sue alone on the warranty for his share of the damages.

If an action be brought against many, and to this an accord and satisfaction by one be pleaded in bar, it must be complete, covering the whole ground, and fully executed. It is not enough if it be in effect only a settlement with one of the defendants for his share of the damages; nor would it be enough if it were only this in fact, although in form an accord and satisfaction of the whole claim. (*w*)

Joint trustees are not necessarily liable for each other, or bound by each other's acts. Each is liable for the acts of others, only so far as he concurred in them, or connived at them, actively or negligently. Each is, in general, responsible only for money which he has himself received; and if he signs a receipt with the others, he may, at least in equity,

(*w*) *Anderson v. Turnpike Co.* 16 Hamp. 136; *Rayne v. Orton*, Cro. Eliz. Johns. 87; *Clark v. Dinsmore*, 5 New 305; *Lynn et al. v. Bruce*, 2 H. Bl. 317.

3. In the following cases a several action was held to be properly brought.

KEIGHTLEY v. WATSON, 3 Exch. 716.

[For an abstract of this case see note (g) *supra*.] — *JONES v. ROBINSON*, 1 Exch. 454. The declaration stated that the plaintiff and A. B. carried on business in copartnership; and in consideration that they would sell defendant their business, and become trustees for him in respect of all debts, &c., due to plaintiff and A. B. in respect thereof, defendant promised plaintiff to pay him all the money he had advanced in respect of the copartnership, and for which it was accountable to plaintiff, and also promised plaintiff and A. B. that he would discharge all the debts due from the plaintiff and A. B. as such copartners, and all liabilities to which they were subject. The declaration then averred that plaintiff and A. B. did sell the business to defendant, and became trustees for him in respect of all debts, &c., due to plaintiff and A. B. in respect thereof, and that, at the time of the promise, plaintiff had advanced a certain sum, for the non-payment of which the action was brought. On motion in arrest of judgment, the defendant contended that the consideration moved from the plaintiff and A. B. jointly, and therefore, (as the consideration is the essential part of a contract, without which the promise is nothing,) A. B. should have been joined as co-

plaintiff; but the court held that the separate interest of the plaintiff in the partnership fund was the consideration upon which the promise sued upon in this case was founded; and, therefore, the rule for which the defendant contended did not apply. — *PALMER v. SPARSHOTT*, 4 M. & Gran. 137. By an agreement, not under seal, between defendant of the one part, and plaintiff and F. of the other part—reciting that plaintiff and F. had assigned certain property to defendant for 150*l.* apiece, and that it had been agreed that defendant should retain 50*l.* out of each 150*l.*—the defendant, in consideration of the two several sums of 50*l.* and 50*l.* so retained, agreed with plaintiff and F., their executors, &c., to indemnify plaintiff and F., and each of them, their heirs, executors, &c., and their, and each and every of their, estates and effects, from the costs of a certain action. Held, that plaintiff might maintain assumpsit upon this agreement without joining F. — *POOLE v. HILL*, 6 M. & W. 835. Covenant. By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c. Held, that this

* show that he did not receive the money, and thus remove or limit his liability; but if this be not shown, the joint receipt is evidence against all. (x) A trustee may thus explain his receipt, because he is obliged to join with the others in giving one; but a co-executor not being under this necessity, it is said that he is bound by the receipt he signs. (y) And, in general, any co-executor or co-trustee who does jointly with the others any act which it is not necessary for him to do, is bound thereby to any party who shall suffer therefrom. (z)

If two or more persons are bound jointly to pay a sum of money, and one of them dies, at common law his death not

(x) *Fellows v. Mitchell et al.* 1 P. Wms. 83, and Cox's note; *Westley v. Clarke*, 1 Eden, 360; *Griffin v. Macaulay*, 7 Grattan, 476.

(y) *Sadler v. Hobbs*, 2 Br. Ch. 114; *Chambers v. Minchin*, 7 Ves. 198.

(z) *Brice v. Stokes*, 11 Ves. 319; *Sadler v. Hobbs*, 2 Brown, Ch. 95, and note to Am. edition.

covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested.—*PLACE v. DELEGAL*, 4 Bing. N. C. 426. Assumpsit. One Evans, as attorney for plaintiffs, executors of Miers, having sold an estate, to a share of the proceeds of which W. was entitled as legatee, and defendant claiming W.'s share of such proceeds, under an agreement with W., plaintiffs paid the amount to defendant, on receiving from him a guaranty in these terms:—"Mr. John Evans, and also Messrs. Place and Meabry, [the plaintiffs] as the executors of the will of the late Mr. John Miers: In consideration of your having paid, &c., I hereby undertake to indemnify and save you and each of you harmless, &c. C. Delegal." Held, that plaintiffs might sue on this guaranty without joining Evans.—*THACKER v. SHEPHERD*, 2 Chitty, 652. The plaintiff and one R., being insurance brokers and partners, effected a policy of insurance on the defendant's ship. The premium was not paid to the underwriter till after R. had become bankrupt, when it was paid by the plaintiff alone out of his private property. The plaintiff brought this action alone to recover the amount of the premium thus paid. Held, that the action was well brought.—*GLOSSOP v. COLMAN*, 1 Stark. 25. Assumpsit. Plain-

tiff had held out his son as his partner, and had made out bills and signed receipts in their joint names; but held by the court of K. B. that he was not precluded from maintaining his action by showing that his son was not in fact his partner.—*DAVENPORT v. RACKSTROW*, 1 C. & P. 89. *Hullock, B.*, S. P.—*KELL v. NAINBY*, 10 B. & Cress. 20, S. P. "A party with whom the contract is actually made may sue without joining others with whom it is apparently made." *Parke, J.*—*GARRET v. TAYLOR*, 1 Esp. Nisi Prius, 117. "Three persons had employed the defendant to sell some timber for them, in which they were jointly concerned. Two of them he had paid their exact proportion, and they had given him a receipt in full of all demands. The third now brought his action for the remainder, being his share; and it was objected, that as this was a joint employment by three, one alone could not bring his action. But it was ruled by Lord Mansfield, that where there had been a severance as above stated, that one alone might sue. 4 G. 3 MS."—*KIRKMAN v. NEWSTEAD*, 1 Esp. Nisi Prius, 117. "Action for the use and occupation of a house. It appeared that the house was the property of six tenants in common, to all of whom, except the plaintiff, the defendant had paid his rent; and this action was for his share of the rent. It was objected that one tenant

only severs the joinder, but terminates the liability which belonged to him, so that it cannot be enforced against his representatives; (a) but if they were bound jointly and severally, the death of one has not this effect. (aa) If bound jointly, the whole debt becomes the debt of the survivors alone, and if they pay the whole, they can have at law no contribution against the representatives of the deceased, because this would be an indirect revival of a liability which death has wholly terminated. (b) But where the debt was made joint by fraud or error, equity will relieve by granting contribution; as it will if the debt were for money lent to both and received by both, so that both actually participated in the benefit. (bb) If the last survivor dies, leaving the debt

(a) Bac. Abr. Obligations, D. 4; Osborne v. Crosbern, 1 Sid. 238; Calder v. Rutherford, 3 Br. & Bing. 302; Foster v. Hooper, 2 Mass. 572. Yorks v. Peck, 14 Barb. 644.

(aa) Towers v. Moore, 2 Vern. 99; May v. Woodward, Freeman, 248.

(b) See note (e) p. 33, post.

(bb) Waters v. Riley, 2 Har. & Gill, 313; Simpson v. Vaughan, 2 Atk. 33, Yorks v. Peck, 14 Barb. 644.

in common alone could not bring this action, but that all ought to join; but Lord Mansfield overruled the objection, and the plaintiff recovered. Sitt. Westm. M. 1776, MS." [The above two cases from Espinasse's Nisi Prius, are of doubtful authority. See note to Hattell v. Griffith, 4 Tyr. 488, and Walford on parties, 466.] WOTTON v. COOKE, Dyer, 337, b. Covenant. Three purchased lands jointly in fee and covenanted each with the others and their heirs, *et eorum utrique*, to convey to the heirs of those who happened to die first their respective third parts. Two of the three having died, the heir of one of them brought this action against the survivor, alleging that he had not conveyed to him according to his covenant. It was moved, in arrest of judgment, that the covenant was joint, and not several, for the word "*utrique*" in Latin is *conjunctim*, and not *separatim*; *sed non allocatur*, and judgment was given for the plaintiff.

American Cases.—HALL v. LEIGH, 8 Cranch, 50. Plaintiff and P. consigned to defendant a quantity of cotton, of which they were joint owners. They gave defendant separate and different instructions for the disposition of their respective moieties, each distinctly confining his instructions to his own

moiety. *Held*, reversing judgment of circuit court, that plaintiff could maintain an action for the violation of his instructions, without joining P.—SWETT v. PATRICK, 2 Fairfield, 179. Defendant conveyed land with warranty to A., B., and C. *Held*, on demurrer, that a several action on the warranty was well brought by A.—SHARP v. CONKLING, 16 Vermont, 354. Covenant. By indenture between the plaintiff and others, of the first part, and the defendant of the other part, the defendant covenanted with the parties of the first part that he would turn from its natural channel a certain stream of water which flowed over the land of the covenantees; and whereas, the water, when diverted, would pass over the land of the plaintiff, that he would so convey it as not to injure said land. The plaintiff brought the action without joining the other covenantees, and alleged breaches of both covenants. *Held*, that he might recover on the second covenant, but not on the first. Redfield, J., said the court were willing to abide by the rule that, where the interest in the subject-matter secured by the covenant is several, although the terms of the covenant will more naturally bear a joint interpretation, yet, if they do not exclude the inference of being intended to be several,

unpaid, his representatives alone are chargeable, and have no contribution against the representatives of the other deceased obligor.

In most of the United States, the rule of the common law is changed by statute. The representatives of the deceased continue to be bound by his obligation. If the debtors were jointly bound, the creditor could bring but one action when all were alive, and that against all; and then obtaining judgment and taking out execution against all, he might levy it on all or either as he chose, leaving them to adjust their proportions by contribution. Now, it should seem that after the death of a joint debtor, the creditor cannot join the survivors and the representatives of the deceased in one action, even if the statute gives the creditor, where one of many joint debt-

they shall have a several construction put upon them. See also *Catlin v. Barnard*, 1 Aikens Vt. 9; *Harrold v. Whitaker*, 10 Jur. 1004; *Mills v. Ladbroke*, 7 M. & Gr. 218; *Simpson v. Clayton*, 4 Bing. N. C. 758; *Withers v. Bircham*, 3 B. & Cr. 254; *Johnson v. Wilson*, Willes, 248; *Lloyd v. Archbold*, 2 Taunt. 324; *Story v. Richardson*, 6 Bing. N. C. 123; *Owston v. Ogle*, 13 East, 538; *Lahy v. Holland*, 8 Gill, 445.

4. In the following cases it was held that a joint action should have been several.

SEATON v. BOOTH, 4 Ad. & El. 528. Assumpsit. A., B., and C., being interested in certain lands, but having no common legal interest in any portion of them, agreed together, according to their respective interests, to put them up for sale, and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated, among other things, that if the purchaser should be let into the premises before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money as and for rent. Defendant bought four of the lots, and was let into possession, and held for several years without paying the purchase-money; whereupon the vendors brought their joint action against him, to recover rent. Their declaration contained two counts: one upon the contract between the

plaintiffs and defendant for the sale of the property; the other for use and occupation. *Held*, that the action could not be sustained on either count; not on the first, because no joint contract with all the plaintiffs was proved; not on the second, because no joint ownership in the plaintiffs, and occupation under them was proved: — *WILKINSON v. HALL*, 1 Bing. N. C. 713. Action of debt against lessee for double value, under stat. 4 G. 2, c. 28, for holding over. *Held*, that tenants in common could not maintain such action jointly where there had been no joint demise. "If there be no joint demise, there must be several actions for rent, for a joint action is not maintainable except upon a joint demise." *Tindal, C. J.* — *SERVANTE v. JAMES*, 10 B. & Cr. 410. Covenant. The defendant, who was master of a vessel, covenanted with the plaintiff and others, part-owners, and their several and respective executors, administrators, and assigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names. The action was brought by all the covenantees jointly. *Held*, that the covenant was several, and so the action not well brought, but each covenantee should have brought a separate action. — *GRAHAM v. ROBERTSON*, 2 T. R. 282. Plaintiffs, together with A. & B., being owners of one ship, and the defendant of another, a prize

ors dies, the same remedy by action as if the contract were joint and several; inasmuch as an executor cannot be joined with the survivors in an action upon a contract which was originally joint and several, because one would be charged *de bonis testatoris*, and the other *de bonis propriis*, which cannot be; (cc) but the creditor may elect which to sue. (dd) He may sue either, or both, in distinct actions, and may levy his executions upon either or both. But he can get, in the whole, only the amount of his debt; and the survivors and the representatives of the deceased, or the representatives of all the debtors, if all are deceased, have against each other a claim for contribution, if either pay more than a due proportion. (ee)

If one or more of several joint *obligees* die, the right of action is solely in the survivors, and if all die, the action must be brought by the representatives of the last survivor. (f) But if the right under the contract be several, the representatives of the deceased party may sue, although the other obligees are living. (g)

(cc) *Kemp v. Andrews*, Carth. 171; *Hall v. Huffam*, 2 Lev. 228.

(dd) *May v. Woodward*, Freem. 248; *Enys v. Donnithorne*, 2 Burr. 1190.

(ee) *Peaslee v. Breed*, 10 New Hamp. 489; *Bachelor v. Fiske*, 17 Mass. 464.

(f) *Rolls v. Yate*, Yelv. 177; *Anderson v. Martindale*, 1 East, 497; *Stowell's Admr. v. Drake*, 3 Zabriskie, 310.

(g) *Shaw v. Sherwood*, Cro. Eliz. 729.

was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded, with costs, which was paid solely by the plaintiffs, A. and B. having in the mean time become bankrupts. An action could not be brought by the plaintiffs alone for a moiety of the restitution money and costs, because it was either a partnership transaction, when A. and B. ought to be joined; or not, when separate actions should be brought by each of the persons paying. See also *Smith v. Hunt*, 2 Chitty, 142; *Brandon v. Hubbard*, 2 Br. & Bing. 11; *Tippet v. Hawkey*, 3 Mod. 263; *Brand v. Boulcott*, 3 Bos. & Pul. 235; *Kelby v. Steel*, 5 Esp. 194.

American Cases. — *BOGGS v. CURTIN*, 10 S. & Rawle, 211. Two firms, C. & B. and J. & D., having become sureties for A., gave their joint and several note

for the debt of A. *Held*, that the two firms, on payment by them of the note, could not maintain a joint action against A., it not appearing that the payment was made out of a *joint fund* of the two firms. "The action of *assumpsit* must be joint or several, accordingly as the promise on which it is founded is joint or several. Where the promise is *express*, there can be little difficulty in determining to which class it belongs, as its nature necessarily appears on the face of the contract itself; and if it be joint, all to whom it is made must, or at least may sue on it jointly. . . . But an *implied* promise, being altogether ideal, and raised out of the *consideration* only by intendment of law, follows the nature of the consideration; and as that is joint or several, so will the promise be." *Gibson, J.* — *CARTHRAE v. BROWN*, 3 Leigh, 98. C. covenanted with B. & J. that he would pay B. and

SECTION III.

OF CONTRIBUTION.

Where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them *pay the whole, or more than his or their share, and thereby relieve the others so far from their liability, those paying may recover from those not paying, the aliquot proportion which they ought to pay. (c) The persons not paying, but being relieved from a positive liability by the payment of others who were bound with them, are held by the law as under an implied promise *to contribute* each his share to make up the whole sum paid. (d) And this rule applies equally to those

J. \$300, namely, to each of them one moiety thereof. *Held*, a several covenant, so that B., as the survivor of the two, could not maintain an action to recover the whole sum. — *ULMER v. CUNNINGHAM*, 2 Greenl. 117. Assumpsit for money had and received. Goods, belonging to some, and not to all, of sundry *joint debtors*, were taken in execution and wasted. *Held*, that all the debtors could not maintain a joint action against the sheriff, and that those only ought to have sued whose property was actually wasted.

(c) Harbert's case, 13 Co. R. 13 a, 15 b; *Layer v. Nelson*, 1 Vernon, 456; *Tous-saint v. Martinnant*, 2 T. R. 104; *Kemp v. Finden*, 12 M. & W. 421; *Browne v. Lee*, 6 B. & Cress. 689; *Sadler v. Nixon*, 5 B. & Ad. 936; *Holmes v. Williamson*, 6 M. & Sel. 159; *Blackett v. Weir*, 5 B. & Cress. 387; *Lanchester v. Tricker*, 1 Bing. 201; *Boulter v. Peplow*, 9 Com. Bench, 193. In *Offley and Johnson's case*, 2 Leon. 166 [A. D. 1584,] the Court of King's Bench held that one surety had no right at common law to recover contribution from a co-surety. "The first case of the kind in which the plaintiff succeeded was before *Gould, J.*, at *Dorchester*." *Buller, J.*, 2 T. R. 105. — The action for money paid to recover contribution is founded upon the old writ *de contributione faciendâ*. *Tindal, C. J.*, *Edger v. Knapp*, 5 M. & Gran. 758, citing

Fitzherbert's Natura Brevium, 378, in edition of 1794, p. 162. From the passage in *Fitzherbert*, as the English version is amended by the learned reporter of *Edger v. Knapp*, (5 M. & Gran. 758, 759,) it seems a *parcener* distrained upon is entitled to contribution without any express agreement on the part of her coparceners, while to entitle a *joint feoffee* to contribution, under similar circumstances, the other feoffees must have agreed to contribute. In analogy to the case of feoffees, one partner in order to entitle himself to recover contribution of his copartner, is bound to show a contract independent of the relation of partner: *Tindal, C. J.*, 5 M. & Gran. 759. It is not sufficient for him to show that the payment made on account of his copartners was made *by compulsion of law*. *Sadler v. Nixon*, 5 B. & Ad. 936. — In *Hunter v. Hunt*, 1 Com. Bench, 300, plaintiff and defendant respectively were under-lessees, at distinct rents, of separate portions of premises, the whole of which were held under one original lease, at an entire rent. Plaintiff, having paid the whole under a threat of distress, brought an action against defendant to recover the proportion of rent due from him, as for money paid to his use: — *Held*, that the action was not maintainable.

(d) Contribution was at first enforced only in equity, and Lord *Eldon* regret-

who are bound as original co-contractors, and to those who are bound to pay the debt of another or answer for his default, as co-sureties. (e)

* The payment, to establish a claim for contribution, must be compulsory. But this does not mean that there must be a suit, but only a fixed and positive obligation. (f) For

ted (not without reason, in the opinion of Baron Parke, 6 M. & W. 168,) that courts of law ever assumed jurisdiction of the subject. It is universally admitted that the duty of contribution *originates* in the equitable consideration that those who have assumed a common burden ought to bear it equally: from this equitable obligation the law implies a contract, since all who have become jointly liable may reasonably be considered as mutually contracting among themselves with reference to the duty in conscience. Lord Eldon, *Craythorne v. Swinburne*, 14 Ves. 160, 169, (adopting the view taken by *Romilly arguendo*); *Campbell v. Mesier*, 4 Johns. Ch. 334; *Landsdale v. Cox*, 7 Monroe, 401; *Fletcher v. Grover*, 11 N. H. 368; *Johnson v. Johnson*, 11 Mass. 359; *Chaffee v. Jones*, 19 Pick. 264; *Horbach v. Elder*, 18 Penn. 33. — Assumpsit for money paid is the usual action for enforcing contribution, and its propriety, before taken for granted, was confirmed in *Kemp v. Finden*, 12 M. & W. 421.

(e) The payee of a note, given by the defendant's testator as principal, neglected to present it to the executor within two years after the original grant of administration, and was by statute barred of his action against him. The plaintiff who signed the note as surety was held not to be discharged by the creditor's neglect to present his claim, and having paid the note was entitled to recover the amount of the executor. *Sibley v. McAllister*, 8 New Hamp. 389. *Bachelor v. Fiske*, 17 Mass. 464, was perhaps the earliest case where the executor of a deceased co-debtor was held liable at law for contribution. The court there met the technical objections that were raised, with the maxim, *Ubi jus ibi remedium*. And see *McKenna v. George*, 2 Rich. Eq. 15.

The surviving surety on a joint administration bond, on account of which he was compelled to make large payments, sought to recover contribution from the

representatives of a deceased co-surety — it was held, that in the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost against the representatives of him who dies first; that where all the obligors are principals, equity will enforce contribution though the remedy at law is gone, but in case of a surety it will not interfere to charge him beyond his legal liability in the absence of fraud, accident, or mistake; that although a surety who has paid the debt may compel his living co-surety to contribute, he has no such right either at law or in equity, against the estate of a deceased co-surety, because the liability of the creditor was terminated by his death and cannot be indirectly revived. *Waters v. Riley*, 2 H. & Gill, 305. But see the able dissenting opinion of *Archer, J.*

(f) *Pitt v. Purssord*, 8 M. & W. 538; *Maydew v. Forrester*, 5 Taunt. 615; *Davies v. Humphreys*, 6 M. & W. 153; *Lord Kenyon, Child v. Morley*, 8 T. R. 614; *Frith v. Sprague*, 14 Mass. 455; *Russell v. Failor*, 1 Ohio State Reps. 327. — It has even been held that a surety paying when he had a good defence, which defence, however, was not available to the principal if he had been sued by the creditor, may recover of the principal; *Shaw v. Loud*, 12 Mass. 461. Whether contribution can be recovered for the costs of a suit sustained in resisting payment is left in doubt by the authorities. Lord Tenterden ruled against contribution for costs in *Roach v. Thompson*, M. & Malk. 489; *Gillett v. Rippon*, Ib. 406; *Knight v. Hughes*, Ib. 247; in the latter case intimating that there might be a distinction between a case between two sureties (the case before him) and a case of surety against principal. But in *Kemp v. Finden*, 12 M. & W. 421, where the plaintiff and defendant had executed, as sureties, a warrant of attorney, given as collateral security for a sum of money advanced on mortgage to the principals, and, on default being made by the prin-

where a contract is broken, the surety may pay without suit and hold the principal, and a co-surety may pay and hold the co-sureties to contribution. (*g*) And the right to contribution arises although the co-surety paid the debt after giving a bond for it without the knowledge of the co-sureties. (*h*)

A defendant in an action *ex contractu*, where judgment was rendered for the plaintiff, upon satisfying the execution, makes out a claim for contribution against other parties, by showing either that such parties were co-defendants in the action, or that they were jointly liable in fact for the debt

cipals, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff, it was *held* that he was entitled to recover from the defendant as his co-surety a moiety of the costs of such execution. *Parke, B.*, said, "They were costs incurred in a proceeding to recover a debt for which, on default of the principals, both the sureties were jointly liable; and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion." — A surety to a note was subjected to costs in consequence of its non-payment by the principal; there was an agreement in writing to save him harmless;—*held*, that he was entitled to recover the costs so paid by him in an action against the principal. *Bonney v. Seely*, 2 Wend. 481. In *Cleveland v. Covington*, 3 Strob. L. 184, it was held that as a general rule a principal was liable for costs incurred by the surety, and was therefore incompetent as a witness in an action against him. Where a judgment, recovered against an insolvent principal, and his two sureties, was paid by one of them, *held*, that he could recover of his co-surety one half of the costs. *Davis v. Emerson*, 17 Maine, 64. And in *Fletcher v. Jackson*, 23 Verm. 593, the right of a co-surety to recover costs and expenses is said to depend altogether upon the question whether the defence was made under such circumstances as to be regarded as hopeful and prudent; if so, the expenses of defence may always be recovered.—But not if the surety be notified that there is no defence. *Beckley v. Munson*, 22 Conn. 299. — In *Boardman v. Paige*, 11 N. Hamp. 431, where an action was commenced by the holder of a note against all the co-signers, and judgment was recovered

against one only, it was held that upon payment of damages and costs of the judgment, the party against whom the judgment was recovered was not entitled to contribution from the other co-signers in respect of the costs—the same not being a burden common to all the co-signers of the note.—It would seem not unreasonable to conclude, notwithstanding the *nisi prius* decisions of Lord *Tenterden*, that where the party from whom contribution is sought was at the time of the former action directly liable for the debt to the creditor, so that if the latter had chosen he might have been sued by him, contribution may be recovered for the costs of the judgment, though not perhaps for costs incurred in resisting payment of the judgment. Yet in the late case of *Henry v. Goldney*, 15 M. & W. 494, 496, an action *ex contractu* being brought against A., and he pleading in abatement the pendency of another action for the same cause against B., it was contended that the plea ought to be sustained, to prevent A. from being twice vexed for the same cause; but *Alderson, B.*, observed, "How is A. vexed by an action being brought against B.? B. cannot recover against A. his proportion of the costs."

(*g*) It has been held in Kentucky that the principal must be insolvent to render a co-surety liable to contribute to another who has paid the debt. *Pearson v. Duckham*, 3 Litt. 386; *Daniel v. Ballard*, 2 Dana, 296. But this is opposed to the prevailing doctrine. *Cowell v. Edwards*, 2 B. & Pull. 268; *Odin v. Greenleaf*, 3 New Hamp. 270.

(*h*) *Dunn v. Slee*, Holt, 399; where it was also held by *Park, J.*, that time given to one surety is no bar to an action afterwards by that surety against a co-surety.

which was made a cause of action against him alone. (*i*) But in the latter case the joint liability must not be a liability as copartners. (*j*)

At law a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; (*k*) but in Equity it is otherwise. (*l*)

* The contract of contribution is a several contract. (*m*) And hence a surety may release one of his co-sureties without barring his right of action against the rest, although he may not be the principal debtor. (*n*) But if two co-sureties pay the debt out of a joint fund, their right of action against the principal, and as it would seem against other co-sureties, is joint. (*o*)

The contract on which the assumpsit is founded dates

(*i*) In *Murray v. Bogert*, 14 Johns. 318, it was held that where A., who claims contribution of B. and C., on the ground of having paid a judgment, shows neither that B. and C. were parties to the judgment, nor that the debt was a joint one, not arising out of a partnership transaction, he must be nonsuited. The reporter's abstract seems incorrect, in so far as it represents the court as holding that the mere absence of proof that the defendants were parties to the judgment was fatal to the claim of contribution. Such a doctrine would be directly in the face of *Holmes v. Williamson*, 6 M. & Sel. 158; *Burnell v. Minot*, 4 Moore, 340; *Boardman v. Paige*, 11 N. Hamp. 431.

(*j*) *Sadler v. Nixon*, 5 B. & Ad. 936; *Edger v. Knapp*, 5 M. & Gran. 758; *Murray v. Bogert*, 14 Johns. 318; *Pearson v. Skelton*, 1 M. & W. 504, where the former action was *ex delicto*. But where the joint contractors were, together with many others, partners in a joint stock company, of which they were the contract committee men, contribution was enforced between them on account of the joint liability incurred by them as such committee. *Boulter v. Peplow*, 9 Com. Bench. 493.

(*k*) *Browne v. Lee*, 6 B. & Cress. 689; *Cowell v. Edwards*, 2 B. & Pull. 268.—*Shaw, C. J.*, *Chaffee v. Jones*, 19 Pick. 265.

(*l*) *Peter v. Rich*, 1 Ch. Rep. 34;

Cowell v. Edwards, 2 B. & Pull. 268.—And in Vermont the rule of equity has been held to be the rule of law also. *Mills v. Hyde*, 19 Verm. 59. See also *Henderson v. McDuffee*, 5 New Hamp. 33, *accord.*; but there the decision went, partly at least, on the necessity of the case, there being no court to administer equitable relief. It has been decided in South Carolina, that co-sureties who are not within the jurisdiction, as well as insolvent co-sureties, are to be excluded in the calculation of the proportion to be contributed by those against whom payment can be enforced. *McKenna v. George*, 2 Richards. Eq. 15.

(*m*) *Kelby v. Steel*, 5 Esp. 194; *Graham v. Robertson*, 2 T. R. 282; *Brand v. Boulcott*, 3 B. & Pull. 235; *Birkley v. Presgrave*, 1 East, 220; *Parker v. Ellis*, 2 Sandf. S. Ct. R. 223.

(*n*) *Crowdus v. Shelby*, 6 J. J. Marsh. 61; *Fletcher v. Grover*, 11 New Hamp. 368; *Fletcher v. Jackson*, 23 Verm. 581.

(*o*) *Osborne v. Harper*, 5 East, 225; *Boggs v. Curtin*, 10 S. & Rawle, 211; *Pearson v. Parker*, 3 New Hamp. 366; *Jewett v. Cornforth*, 3 Greenl. 107; *Fletcher v. Jackson*, 23 Verm. 593. *Contra*, *Gould v. Gould*, 8 Cowen, 168; but *Kelby v. Steel*, 5 Esp. 194, on the authority of which this case seems to have been decided, is quite distinguishable from *Osborne v. Harper*.

from the time when the relation of co-surety or co-obligor is entered into; although the cause of action does not arise till the payment. Hence the discharge of one of the joint debtors (by whatever cause) from his direct liability to the creditor, does not relieve him in law, any more than in equity, from his obligation to indemnify such of the remaining joint debtors as have borne more than their original proportion of the debt. (*p*)

The undertaking which is to serve as the foundation of a claim of contribution must be joint, not separate and successive. Thus, the second indorser of a promissory note is not liable to the first, though neither be indorser for value; (*q*) unless there be an agreement between the indorsers that, as between themselves, they shall be co-sureties. (*qq*) And a guarantor cannot be compelled to contribute in aid of a surety. (*r*)

The right of contribution exists against all who are sureties for the *same debt*, although their primary liability depends upon different instruments. Where two bonds, for example, * are given for the performance of the same duty, and A. and B. sign as sureties in one, and C. and D. in the other, A., if he pay the debt, may in equity recover one fourth of the whole from each of the rest. (*s*)

A party acquires a right to contribution as soon as he pays more than his share, but not until then; (*t*) and con-

(*p*) Accordingly, where the liability of one joint maker of a promissory note was continued by partial payments within six years, but the remedy of the holder against the other was barred by the statute of limitations, the debtor who continued liable could notwithstanding recover contribution from the others after paying the debt. *Peaslee v. Breed*, 10 New Hamp. 489; and *Boardman v. Paige*, 11 New Hamp. 431.

(*q*) *McDonald v. Magruder*, 3 Pet. 470; *Decrest v. Burt*, 7 Cush. 551.

(*qq*) *Weston v. Chamberlain*, 7 Cush. 404; *Hogue v. Davis*, 8 Grattan, 4. See also *Westfall v. Parsons*, 16 Barb. 645; *Pitkin v. Flanagan*, 23 Verm. 160.

(*r*) *Longley v. Griggs*, 10 Pick. 121. In *Harris v. Warner*, 13 Wend. 400, it was held that the defendant, who was

the last of four sureties for H. in a joint promissory note, was not bound to make contribution to the plaintiff who was the first surety and had paid the debt, the defendant having qualified his undertaking by adding to his signature the words "surety for the above names."

(*s*) *Deering v. Winchelsea*, 2 Bos. & Pul. 270; *Mayhew v. Crickett*, 2 Swans. 185; *Craythorne v. Swinburne*, 14 Ves. 160. *Semble*, the same principle may be applied at law; *Bronson, C. J.*, *Norton v. Coons*, 3 Denio, 130, 132; *Chaffee v. Jones*, 19 Pick. 260, 264; *Enicks v. Powell*, 2 Strob. Eq. 196.

(*t*) *Davies v. Humphreys*, 6 M. & W. 153; *Lord Eldon, ex parte Gifford*, 6 Ves. 808; *Lytle v. Pope*, 11 B. Mon. 297.

sequently the statute of limitations does not begin to run until then. (u)

The law does not raise any such implied promise, or right to contribution, among wrongdoers, or where the transaction was unlawful. (v) If money be recovered in an action grounded upon a tort it gives no ground for contribution. (w) Still, however, contribution is sometimes enforced where he who is to be benefited by it did not know his act to be illegal, or where it was of doubtful character. (x)

*The implied promise and the right to contribution resting upon it may be controlled by circumstances or evidence showing a different understanding between the parties; thus, a surety cannot exact contribution of one who became co-surety at his request. (y)

(u) *Davies v. Humphreys*, 6 M. & W. 153; *Ponder v. Carter*, 12 Ire. Law 242.

(v) *Pitcher v. Bailey*, 8 East, 171; *Booth v. Hodgson*, 6 T. R. 405.

(w) *Merryweather v. Nixan*, 8 T. R. 186; *Farebrother v. Ansley*, 1 Camp. 343; *Wilson v. Milner*, 2 Camp. 452; *Thweatt v. Jones*, 1 Rand. 328.

(x) *Betts v. Gibbins*, 2 Ad. & El. 57; 4 N. & M. 64. There the defendants having sold ten casks of goods and sent them to the plaintiffs to deliver to buyer, subsequently ordered the plaintiffs to deliver a portion of them to another person, which order they obeyed. It was held, that a promise to indemnify the plaintiffs might be implied from the facts, on which they could recover for the injury sustained in consequence of fulfilling the order, although they had no right to detain the goods or change their destination — the general rule that between wrongdoers there is neither indemnity nor contribution not applying where the act is not clearly illegal in itself, and is done *bonâ fide*.—In *Adamson v. Jarvis*, 4 Bing. 66, 72, *Best*, C. J., said, "It was certainly decided in *Merryweather v. Nixan*, that one wrongdoer could not sue another for contribution; Lord *Kenyon*, however, said, 'that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right. This is the only decided case on the subject that is *intelligible*. There is a

case of *Walton v. Hanbury and others*, (2 Vern. 592,) but it is so imperfectly stated, that it is impossible to get at the principle of the judgment. The case of *Philips v. Biggs*, (Hard. 164,) was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of *Middlesex*, where one had paid the damages in an action for an escape, and sued the other for contribution as like the case of two joint obligors. From the inclination of the court in this last case, and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."—*Wooley v. Batte*, 2 C. & Payne, 417; a party having recovered damages in case against one of two joint coach proprietors for an injury sustained by the negligence of their servants; held, that such proprietor (he proving that he was not personally present when the accident happened) might maintain an action against his co-proprietor for contribution. See also *Ives v. Jones*, 3 Ire. L. 538. But there can be no recovery in such case if the two proprietors are partners. *Pearson v. Skelton*, 1 M. & W. 504. See *Thweatt v. Jones*, 1 Rand. 328.

(y) *Turner v. Davies*, 2 Esp. 478; *Byers v. McClanahan*, 6 G. & Johns.

The commercial law of France, and of continental Europe generally, admits the right to contribution, and regulates it much as the law of England and this country. (z) The civil law wholly rejects it. (a) But by a decree of the Emperor Hadrian, a co-surety being sued, might require the plaintiff to proceed against all liable jointly with him. He could not therefore be compelled to pay the whole unless through his own neglect. (b)

256; *Daniel v. Ballard*, 2 Dana, 296; *Taylor v. Savage*, 12 Mass. 98, 103. And see *Thomas v. Cook*, 8 B. & Cress. 728; *Harris v. Warner*, 13 Wend. 400; *Robison v. Lyle*, 10 Barb. 512. But such an agreement cannot be shown by parol evidence when the guaranteed obligation is in writing. *Norton v. Coons*, 2 Seld. 33.

(z) Code Civ. Art. 2033; 1 Pothier on Obligations, by Evans, 291.

(a) Dig. 46, 1, 39.

(b) Inst. 3, 21, 4. If the surety, on paying the debt, took the precaution to obtain a subrogation, he might exercise the actions of the creditor against his co-sureties; 1 Pothier on Obl. by Evans, 291; Cod. 8, 41, 11; Dig. 46, 1, 39.

CHAPTER III.

AGENTS.

Sect. I. — *Of Agency in General.*

THE law of agency is now of very great importance. Such is the complexity of human affairs in civilized society, that very few persons are able to transact all their business, supply all their wants, and accomplish all their purposes, without sometimes employing another person to represent them, and act for them, and in their stead. Such person becomes their agent, and the person employing an agent is his principal.

There are two principles in relation to the law of agency, on one of which it is founded, while the other measures the responsibility of the principal for the acts of an agent. The first of these is, that the agent is but the instrument of the principal, who acts by him; and a principal assumes the relations, acquires the rights, and incurs the obligations which are the proper results of his acts, equally, whether he does these mediately, or directly; whether he uses an unconscious and material instrument, or a living and intelligent instrument; whether he signs his name by a pen which he takes from the table, or by a man whom he requests to sign his name for him. In either case, the thing done is the act of the principal; and, to a considerable extent, the law *identifies* the agent with the principal, although for some purposes, and in some respects, the agent incurs his own share of responsibility, or acquires his own rights, by the act which he performs as the act of another. The second of these principles is, that, as between the principal and a third party who has supposed himself to deal with a principal by means of one purporting to be his agent, the principal is responsible for and is bound by the acts of his agent, not only when he has actually created this agency, but when he has, by words or acts,

distinctly authorized the third party to believe the person to be his agent. If he has justified the belief of the third party, that this person had from him sufficient authority to do as his agent that precise thing, it is no answer on his part, to say that the agent had no authority, or one which did not reach so far, and that it was a mistake on the part of the third party. It may have been his mistake, but the question then is, whether the principal led this third party into the mistake. And in deciding this question, all the circumstances of the transaction, and especially the customary usages in relation to such transactions, come into consideration.

This principle applies to the important distinction between a general agent and a particular agent. (c) A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. A particular agent is one authorized to do one or two special things. But it is not always easy to find a precise rule which determines with certainty between these two kinds of agency. A manufacturing corporation may authorize A. to purchase all their cotton, and he is then their general agent for this especial purpose, or to purchase all the cotton they may have occasion to buy in New Orleans, and then he may be called their general agent for this especial purpose in that place. Or to purchase the cargoes that shall come from such a plantation, or shall arrive in such a ship or ships, or five hundred bales of

(c) See *Jaques v. Todd*, 3 Wend. 83; *Anderson v. Coonley*, 21 Wend. 279; *Savage v. Rix*, 9 New Hamp. 263; *Whitehead v. Tuckett*, 15 East, 400.—The term *Agency* seems to imply two quite distinct things, namely, a contract between principal and agent, and the legal means by which the principal is made without his direct participation, a *Party* to a contract with a third person. No advantage, but only confusion, seems to result from blending these two things. If, in considering Agency in the latter aspect, the domestic contract between agent and principal could be excluded from the mind, and reserved for separate observation, it might conveniently be laid down as the rule of law that the principal is in *all* cases bound for acts of the agent done *within the scope of his*

authority, and *never* except for those. In the case of a particular agent, the scope of authority is measured by the express directions he has received; in the case of a general agent the law permits usage to enter in and enlarge the liability of the principal. This usage, however, is not a uniform, unvarying rule; in other words there is no common scope of authority predicable of every general agent. To say of a certain one he is general agent is not enough to describe his powers, or to determine the extent of his principal's liability: it is next to be ascertained for what particular business he is thus general agent. This done, the agency is brought within a class, and the qualities attach to it which the law, using the light of mercantile custom, affixes to the class at large.

cotton, and then he is their particular agent for this particular transaction.

The importance of the distinction lies in the rule; that if a particular agent exceed his authority, the principal is not bound; (d) but if a general agent exceed his authority the

(d) *Fleming v. Hector*, 2 M. & W. 178; *Todd v. Emly*, 7 M. & W. 427; 8 Ib. 505; *East India Co. v. Hensley*, 1 Esp. 111; *Woodin v. Burford*, 2 C. & Mee. 391; *Jordan v. Norton*, 4 M. & W. 155; *Sykes v. Giles*, 5 M. & W. 645; *Waters v. Brogden*, L. Y. & Jer. 457; *Daniel v. Adams, Ambler*, 495.—But there is a material distinction between *authority*, and *instructions uncommunicated*, and not intended to be communicated to the third party dealing with the agent. Such instructions qualify the liability of the principal neither in the case of a general agency nor of a particular agency. The sound rule of law is set forth by *Parker, C. J.*, giving the judgment of the court in *Hatch v. Taylor*, 10 N. H. 538:—"It is, we think, apparent enough, that all which may be said to a special agent, about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be, at all times, upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications, addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to, in the execution of the agency; and should the agent depart from them, he would violate the instructions given him by the principal, at the time when he was constituted agent, and execute the act he was expected to perform in a case in which the principal did not intend that it should be done. And yet, in such case he may have acted entirely within the scope of the authority given him, and the principal be bound by his acts. This could not be so, if those communications were

limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal, and disregarded by the agent. Thus, where one person employs another to sell a horse, and instructs him to sell him for \$100, if no more can be obtained, but to get the best price he can, and not to sell him for less than that sum, and not to state how low he is authorized to sell, because that will prevent him from obtaining more. Such a private instruction can with no propriety be deemed a limitation upon his authority to sell, because it is a secret matter between the principal and agent, which any person proposing to purchase is not to know, at least until the bargain is completed. And if no special injunction of secrecy was made, the result would be the same; for from the nature of the case, such an instruction, so far as regards the *minimum* price, must be intended as a private matter between the principal and agent, not to be communicated to the persons to whom he proposed to make a sale, from its obvious tendency to defeat the attempt to obtain a greater sum, which was the special duty of the agent. It will not do to say that the agent was not authorized to sell, unless he could obtain that price. That is the very question, whether such a private instruction limits the authority to sell." 545-547. . . . "No man is at liberty to send another into the market, to buy or sell for him, as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent,—that the instructions were limitations upon his authority,—and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were bound to inquire, where inquiry would

principal is bound, (e) provided the agent acted therein within the ordinary and usual scope of the business he was authorized to transact, and the party dealing with the agent did not know that he exceeded his authority. (f) The rule being, as to the public, that the authority of a general agent may be regarded by them as measured by the usual extent of his general employment. (g) The obvious reason for this is, that the public may not be deceived to its injury by previous acts

have been fruitless, and to ascertain that, of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed, and the transaction avoided, leaving the party to such remedy as he might enforce against the agent. From this reasoning we deduce the general principle, that where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer." 548-9.

(e) *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248, 273; *Nickson v. Brohan*, 10 Mod. 109; *Monk v. Clayton*, Molloy, B. 2, Ch. 10, § 27.

(f) *Forman v. Walker*, 4 Louis. Ann. 409. The authority given to the agent must in all cases be *strictly* pursued. *Robertson v. Ketchum*, 11 Barb. 652. The exception, extending the principal's liability in favor of third parties, is only made where such third parties are ignorant that restrictions have been imposed upon the agent. In *Attwood v. Munnings*, 7 B. & Cress. 283, *Bayley, J.*, said:—"This was an action upon an acceptance importing to be by procuration, and therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only

reasonable prudence to require the production of that authority." The authority in that case was contained in two powers of attorney, and it was decided that, taking the proper construction of them, the agent had exceeded his authority, and so the principal was not bound. This case is confirmed by *Withington v. Herring*, 5 Bing. 442. Goods were shipped on board of plaintiff's ship, and by the bills of lading, which were indorsed to the defendants, were to be delivered on *payment of freight*. The bills were indorsed by the defendants to their factors, to whom the goods were delivered, and the freight charged. Assumpsit was brought against the defendants on the bankruptcy of the factors, but was not sustained on the ground that authority to receive the goods was given only on immediate payment of the freight. *Tobin v. Crawford*, 5 M. & W. 235. And see *Hogg v. Snaith*, 1 Taunt. 347; *Acey v. Fernie*, 7 M. & W. 157; *Esdaile v. La Nauze*, 1 Y. & Coll. 394; *Maanss v. Henderson*, 1 East, 335; *Murray v. East India Co.* 5 B. & Ald. 204; *Gardner v. Baillie*, 6 T. R. 591; with which compare *Howard v. Baillie*, 2 H. Bl. 618. The ruling of *Heath, J.*, in *Hicks v. Hankin*, 4 Esp. 114, seems to admit of question.—For instances where the authority of a general agent has been circumscribed, see *Odiorne v. Maxcy*, 13 Mass. 178; *White v. Westport Cotton Man. Co.* 1 Pick. 215; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Wyman v. Hallowell & Augusta Bank*, 14 Mass. 58; *Kerns v. Piper*, 4 Watts, 222; *Terry v. Fargo*, 10 Johns. 114; *Reynolds v. Rowley*, 4 Louis. Ann. 409.—Except the master of a vessel and an acceptor for honor, no agent can *borrow money* on his principal's account without special authority. *Hawtayne v. Bourne*, 7 M. & W. 595.

(g) *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400.

which the agent was fully authorized to do. By such authority the principal does as it were proclaim and publicly declare him to be his agent, and must abide the responsibility of so doing. It would not be right for the principal to say to one who dealt with his general agent; you knew that he was my general agent, for I authorized you and everybody else to believe this, but in this particular instance I had revoked or limited the authority, and the revocation or limitation shall affect you although you did not know it. But a principal may well say to one who dealt with an agent for a particular purpose, it was your business first to ascertain that he was my agent, and then to ascertain for yourself the character and extent of his agency.

Where the agency is implied from general employment, it may survive this employment, and will be still implied in favor of those who knew this general employment, but have not had notice of the cessation of the employment, and cannot be supposed to have knowledge thereof. (*h*) Hence the common and very proper practice of giving notice by public advertisement when such an agency is revoked.

SECTION II.

IN WHAT MANNER AUTHORITY MAY BE GIVEN TO AN AGENT.

An agent, generally, may be appointed by parol, and so authorized to do any thing which does not require him to execute a deed for his principal. (*i*) He may be authorized by parol to make contracts in writing, and to make those which are not binding upon his principal, unless in writing signed by him. (*j*)

(*h*) ——— *v. Harrison*, 12 Mod. 346; *Monk v. Clayton*, Molloy, B. 2, Ch. 10, § 27, cited *per cur.* 10 Mod. 110; *Emmett v. Norton*, 8 C. & Payne, 506.

(*i*) 2 Kent's Comm. 612. The receipt of an authorized agent is the receipt of the principal. *Mackersy v. Ramsays*, 9 Cl. & Fin. 818, 850.—A tender made to an authorized agent is as if made to his principal. *Moffat v. Parsons*, 5 Taunt. 307.—With regard to the execution of contracts under seal,

the rule of the common law is adhered to with strictness. *Gordon v. Bulkeley*, 14 S. & Rawle, 331. And in *Banorgie v. Hovey*, 5 Mass. 11, it was held, (*Sewell, J.*, dissenting,) that a sealed instrument executed in the name of the principal by an agent, not authorized under seal, could not be admitted in evidence in an action of *assumpsit* against the principal. But see *contra*, *Cooper v. Rankin*, 5 Binney, 613, and page 46 *infra* note (*ww*).

(*j*) *Shaw v. Nudd*, 8 Pick. 9; *Ewing*

An authority is presumed or raised by implication of law, on the ground that the principal has justified the belief that he has given such authority, in cases where he has employed a person in his regular employment; (*jj*) as where one sends goods to an auctioneer, or to a common repository room for sale, the bailee has an implied authority to sell. (*k*) And such presumptions frequently arise in the case of a wife; (*l*) or of a domestic servant; (*m*) or of a son who has been permitted for a considerable time to transact a particular business for the father, (*n*) as to sign bills, &c.; or where one has been repeatedly employed to sign for another policies of insurance. (*o*)

It must be remembered, however, that an agent employed for a *special* purpose, derives from this no *general* authority from his principal. (*p*) Where the belief of the authority of an agent arises only from previous action on his part as an

v. Tees, 1 Binney, 450; *Clinen v. Cooke*, 1 S. & Lef. 22; *Coles v. Trecothick*, 9 Ves. 234, 250. And a parol ratification is quite equivalent to an original authority. *Maclean v. Dunn*, 4 Bing. 722. — But by an express provision of the Statute of Frauds, an agent, to grant or assign a term for more than three years, or an estate of freehold, must be authorized thereto in writing. 29 Car. 2, c. 3, § 3.

(*jj*) *Dows v. Greene*, 16 Barb. 72; *Lyell v. Sanbourn*, 2 Mich. 109.

(*k*) *Lord Ellenborough, Pickering v. Busk*, 15 East, 38.

(*l*) *Prestwick v. Marshall*, 7 Bing. 565; *Huckman v. Fernie*, 3 M. & W. 505; *Att'y Gen. v. Riddle*, 2 C. & Jer. 493; *Plimmer v. Sells*, 3 N. & Mann. 422. — After separation, the wife is still her husband's agent for the procurement of such things as are reasonable and necessary for herself. *Emmett v. Norton*, 8 C. & Payne, 506. So where the person cohabited with is only a mistress, and known to be in fact only a mistress, if she is allowed to pass ostensibly as wife. *Ryan v. Sans*, 12 Q. B. 460.

(*m*) A master is not responsible for a contract entered into by a servant to whom he had always given cash for making purchases. *Rusby v. Scarlett*, 5 Esp. 75. So with any particular agent who obtains on credit goods which the

principal gave him money to purchase. *Lord Abinger, C. B., Flemyng v. Hector*, 2 M. & W. 131.

(*n*) *Watkins v. Vince*, 2 Stark. 368.

(*o*) *Brockelbank v. Sugrue*, 5 C. & Payne, 21; *Haughton v. Ewbank*, 4 Camp. 88, where it was held sufficient proof of an agent's authority to subscribe a policy of insurance for an insurer, that the insurer was in the habit of paying losses upon policies so subscribed by him, without producing the power of attorney under which the agent testified that he acted. — An authority to draw is not an authority to indorse; *Robinson v. Yarrow*, 7 Taunt. 455; yet the fact that a confidential clerk had been accustomed to draw, taken in connection with the fact that his master had in one instance authorized him to indorse, and on two other occasions had received money obtained by his indorsement, is evidence from which a jury may infer a general authority to indorse. *Prescott v. Flinn*, 9 Bing. 19.

(*p*) *Reynell v. Lewis*, 15 M. & W. 517; *Dawson v. Morrison*, 16 Law J., C. P., 240; *Cox v. Midland Railway Co.* 3 Exch. 268; *Rusby v. Scarlett*, 5 Esp. 75; *Burness v. Pennell*, 2 House of Lords Cases, 519; *Kaye v. Brett*, 5 Exch. 269; *Thatcher v. Bank of New York*, 5 Sand. 121.

agent, the persons so treating with him must on their own responsibility ascertain the nature and extent of his previous *employment. (q) This may be such as to estop the principal from denying his authority in the particular transaction; but if not, then they have no remedy, unless against the agent himself who misled them. (r) .

SECTION III.

SUBSEQUENT CONFIRMATION.

As agency may be presumed from repeated acts of the agent, adopted and confirmed by the principal previously to the contract in which the question is raised, (s) so such agency may be confirmed and established by a subsequent ratification; the common law having adopted the civil law maxim, "*omnis ratihabitio retrotrahitur et mandato æquiparatur.*" (t) The rule may be stated thus: where any one contracts *as agent* without naming a principal, his acts enure to the benefit of the party, although at the time uncertain or unknown, for whom it shall turn out that he intended to act, provided the party thus entitled to be principal ratify the contract. (tt) And, generally, if the principal receive and hold

(q) *Schimmelpennich v. Bayard*, 1 Peters, 264; *Parsons v. Armor*, 3 Peters, 413; *Blane v. Proudfit*, 3 Call, 207; *Kilgour v. Finlyson*, 1 H. Bl. 155, where a power given, on the dissolution of a partnership, to one of the partners to receive all debts owing to, and to discharge all claims against, the late partnership, was held not to authorize him to *indorse* a bill of exchange in the partnership name, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution.

(r) *Pourie v. Fraser*, 2 Bay, 269.

(s) *Townsend v. Inglis*, Holt, 278; *Haughton v. Ewbank*, 4 Camp. 88; *Barber v. Gingell*, 3 Esp. 60. There the apparent acceptor of a bill of exchange, setting up as a defence that his signature had been forged, it was held a good answer that the defendant had paid other bills of the drawer under similar circumstances.

(t) 18 Vin. Abr. *Ratihabitio*; *Lucena v. Craufurd*, 1 Taunt. 325; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 158; *Fleckner v. U. S. Bank*, 8 Wheat. 363; *Bell v. Cunningham*, 3 Peters, 81; *Hoe v. Oxley*, 1 Wash. (Va.) 19; *Moss v. Rossie Lead Mining Co.* 5 Hill, (N. Y.) 137; *Rogers v. Kneeland*, 10 Wend. 218; *Marsh v. Keating*, 1 Bing. N. C. 198; *Bigelow v. Dennison*, 23 Verm. 565. — If any stranger, in the name of the mortgagor or his heir, (without his consent or privity,) tender the money, and the mortgagee accepteth it, [which, however, he is not bound to do,] this is a good satisfaction, and the mortgagor or his heir, agreeing thereto, may re-enter into the land. Co. Litt. 206, b.

(tt) *Wilson v. Tumman*, 6 M. & G. 242. "*Ratum quis habere non potest quod ipsius nomine non est gestum.*" See also *Saunderson v. Griffiths*, 5 B. & Cr. 909; and

the proceeds or beneficial results of the contract, he will be estopped from denying an original authority, or a ratifica-

Routh v. Thompson, 13 East, 274; Foster v. Bates, 12 M. & W. 226; Hull v. Pickersgill, 1 B. & Bing. 282. This doctrine has frequent application in cases of marine insurance. See Hagedorn v. Oliverson, 2 M. & Sel. 485; Finney v. Fairhaven Ins. Co. 5 Metcalf, 192.—A notice to quit given by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it, the agent having acted in his own name in giving the notice, nor it seems, if he acted in the name of the principal. Doe v. Goldwin, 2 Queen's Bench, 143; Right v. Cuthell, 5 East, 491.—In Bird v. Brown, 14 Jurist, 132, a very important distinction was taken by the Court of Exchequer. A., a merchant at Liverpool, sent orders to B. at New York, to purchase certain goods, which were shipped accordingly in five ships and consigned to A., who, after the receipt of the goods by one of them, stopped payment on the 7th April, 1846. B., pursuant to directions from A., had drawn bills for the goods partly on A. and partly on C., with whom A. had dealings. D., a merchant at Liverpool, and who also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days' sight, and dated some on the 28th, and others on the 30th March, 1846. On the 8th May a fiat in bankruptcy issued against A., and his assignees were appointed. The other four vessels arrived respectively on the 4th, 5th, 7th, and 10th of that month, and immediately on the arrival of each, and while the transitus of the goods on board continued, D., on behalf of B., but not being his agent, and without any authority from him, gave notice to the masters and consignees, claiming to stop the goods *in transitu*. On the 11th of May the assignees made a formal demand of the goods still on board and undelivered, from the master and consignees of each of the four ships, at the same time tendering the freight; but they refused to deliver them, and on the same day, delivered the whole to D. On the next day the assignees made a formal demand of the goods from him, but he refused to deliver them up. On the 28th April, B. heard at New York that A. had

stopped payment, and on the next day he executed a power of attorney to E., of Liverpool, authorizing him to stop the goods *in transitu*. This was received by E. on the 13th May, who on that day adopted and confirmed the previous stoppage by D. B. afterwards adopted and ratified all which had been done both by E. and D. Held, that the title of A. to the goods was not divested by the above stoppages *in transitu*, and consequently that trover for them was maintainable by the assignees against B. Pollock, C. B., delivering the judgment said:—"The doctrine '*omnis ratihabitio retrotrahitur et mandato æquiparatur*' is one intelligible in principle, and easy in its application when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agree to admit that such was the case, J. S. is precisely in the condition in which he meant to be; and if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue that he would have had against A. B. In cases of *tort* there is more difficulty. If A. B., professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of *tort*—the party ratifying becomes as it were a trespasser by estoppel—he cannot complain that he is deemed to have authorized that which he admits himself to have authorized. The authorities, however, go much further, and show that in some cases where an act, which if unauthorized would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, there a sub-

tion. (u) And if a party does not disavow the acts of his agent as soon as he can after they come to his knowledge, he makes these acts his own. (v) An adoption of the agency in part, adopts it in the whole, because a principal is not permitted to accept and confirm so much of a contract made by

sequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under circumstances, when the ratifying party might have himself lawfully done the act which he ratifies. Thus in Lord *Audley's* case, a fine with proclamations was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine; after the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger; this was held to be inoperative, though such ratification within the five years would probably have been good. Now the principle of this case, which is reported in many books, Cro. Eliz. 561; Moore, 457, pl. 630; Poph. 108, pl. 2. and is cited with approbation by Lord Coke in *Margaret Podger's* case, (9 Co. 106. a.) appears to us to govern the present. There the entry to be good must have been made within the five years; it was made within that time but till ratified it was merely the act of a stranger, and so had no operation against the fine; by the ratification it became the act of the party in whose name it was made, but that was not until after the five years — he could not be deemed to have made an entry till he ratified the previous entry — and he did not ratify until it was too late to do so. In the present case the stoppage could only be made during the transitus; during that period the defendants, without authority from Illins, made the stoppage. After the transitus was ended, but not before, Illins ratified what the defendants had done; from that time the stoppage was the act of Illins. But it was then too late for him to stop; the goods had already become the property of the plaintiffs, free from all right of stoppage. We are therefore of opinion that there must be judgment for the plaintiffs." —

It is somewhat remarkable, in view of the present state of the law, that it was at one time strenuously contended that the doctrine of ratification reached less broadly in *contract* than in *tort*; and that although a principal unknown at the time could afterwards adopt the act of the agent in the latter case, he could not in the former. See *Hagedorn v. Oliver-son*, 2 M. & Sel. 485, and per *Park, J.*, in *Hull v. Pickersgill*, 1 B. & Bing. 287.

(u) *Holt, C. J.*, in *Bolton v. Hillersden*, 1 Ld. Raym. 224, 225; *Thorold v. Smith*, 11 Mod. 72; *Byrne v. Doughty*, 13 Geo. 46; *Johnson v. Smith*, 21 Conn. 627. The principal, when he has once affirmed a contract made by the agent without authority, and even fraudulently, cannot afterwards disaffirm it; bringing assumpsit against the third party is an affirmation. *Smith v. Hodson*, 4 T. R. 211, 217. Yet if the party, alleged to be principal, after denying that the agent had authority from him to purchase goods, receive them from the agent in payment of a debt due from the latter, the original seller (whatever other remedy he may have) cannot hold such supposed principal liable as having ratified the purchase made by the agent. *Hastings v. Bangor House*, 18 Maine R. 436. — The ratification of an act of an agent, in order to bind the principal, must be with a full knowledge of all the material facts. *Freeman v. Rosher*, 13 Q. B. 780; *Owings v. Hull*, 9 Peters, 607; *Penn., Del., and Md. Steam Nav. Co. v. Dandridge*, 8 G. & Johns. 248, 323; *Hays v. Stone*, 7 Hill, N. Y. 128; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. — Conduct which would be sufficient to charge an *individual* as principal, may not amount to ratification in the case of a State. *Delafield v. Illinois*, 26 Wend. 192.

(v) *Bredin v. Dubarry*, 14 S. & Rawle, 27; *Veazie v. Williams*, 8 Howard, S. Ct. 134; *Benedict v. Smith*, 10 Paige, 126; *McCulloch v. McKee*, 16 Penn., 289.

one purporting to be his agent, as he shall think beneficial to himself, and reject the remainder. (*w*)

Where the party who undertakes to act as agent has affixed a seal to an instrument which did not need a seal, a *parol* ratification will make the instrument obligatory upon the principal as a simple contract. (*ww*) And where one acting as agent has, without authority, entered into a contract in writing required by the Statute of Frauds to be in writing, the principal is bound by an oral ratification. (*vv*) But it has been held, that a *parol* ratification cannot make that the *deed* of the principal which originally did not bind him from the agent's want of an authority under seal. (*wx*)

The ratification of the tort of an agent does not in general relieve him from liability; although, as in cases of contract, a liability is thereby incurred by the principal. (*wy*)

(*w*) *Wilson v. Poulter*, 2 Stra. 859; *Smith v. Hodson*, 4 T. R. 211; *Hovil v. Pack*, 7 East, 164; *Brewer v. Sparrow*, 7 B. & Cress. 310; *Wright v. Crookes*, 1 Scott, N. R. 685; *Hovey v. Blanchard*, 13 N. H. 145; *Farmer's Loan Co. v. Walworth*, 1 Comst. 447; *N. E. Marine Ins. Co. v. De Wolf*, 8 Pick. 56; *Culver v. Ashley*, 19 Pick. 300; *Bigelow v. Dennison*, 23 Verm. 565; *Hodnett v. Tatum*, 9 Geo. 70; *Elam v. Carruth*, 2 Louis. Ann. 275; *Cook v. Bank of Louisiana*, *Ibid.* 324. It seems the delivery of money to the agent for payment by him to a person with whom the agent had contracted without authority, is such a ratification, (though the delivery of the money be not made known to the other contracting party,) that if the agent embezzle the money, the principal is still bound by the contract. *Ld. Ellenborough*, in *Rusby v. Scarlett*, 5 Esp. 77. — In *Burn v. Morris*, 4 Tyr. 485, trover was maintained against the finder of a bank-note for £20 by the owner. The defendant got the note changed at the Bank of England, and afterwards, being taken before the Lord Mayor, £7 (being part of the proceeds of the note) were found upon her and were restored to the plaintiff. It was contended that this receipt of the £7 was a ratification of the defendant's act, and precluded the plaintiff from treating it as a conversion; and *Brewer v. Sparrow*, 7 B. & Cress. 310, was cited. But Lord *Lyndhurst*, C. B., said, "In that case the whole

proceeds of the sale were taken; that is an adoption of the act: here the receipt of the £7 does not ratify the act of the parties, it only goes in diminution of damages." — If the principal, upon being informed of what has been done, by one acting as his agent, does not give notice of dissent in a reasonable time, his assent shall be presumed. *Cairnes v. Bleecker*, 12 Johns. 300; *Richmond Manufact. Co. v. Stark*, 4 Mason, 296.

(*ww*) *Hunter v. Parker*, 7 M. & W. 322; *Despatch Line v. Bellamy Manf. Co.* 12 N. H. 205; *Worrall v. Munn*, 1 Seld. 229; *Randall v. Van Vechten*, 19 Johns. 61; *Bank of Metropolis v. Guttschlick*, 14 Pet. 29; *Mitchell v. St. Andrew's Bay Land Co.* 4 Flor. 200.

(*vv*) *Maclean v. Dunn*, 4 Bing. 722.

(*wx*) *Steiglitz v. Egginton*, *Holt*, N. P. C. 141, per *Gibbs*, C. J.; *Stetson v. Patten*, 2 Greenl. 358; *Despatch Line v. Bellamy Manf. Co.* 12 N. H. 205; *Parke, B.*, *Hunter v. Parker* 7 M. & W. 343. — In *Blood v. Goodrich* 9 Wend. 77, *Savage*, C. J., advanced the opinion that a ratification in writing might suffice.

(*wy*) It appears indeed to be said in 2 Greenl. Evid. § 68, that a man cannot become a trespasser by ratification. "If the act of the agent was in itself unlawful, and directly injurious to another, no subsequent ratification will operate to make the principal a trespasser; for an authority to commit a trespass does not

SECTION IV.

SIGNATURE BY AN AGENT.

The manner in which an agent should sign an instrument for his principal has given rise to some controversy. There

result by mere implication of law. The master is liable in trespass for the act of his servant, only in consequence of his previous express command." But, as it seems, the cases recognize no greater difficulty in becoming a trespasser by ratifying the trespass of the agent, than in becoming liable *ex contractu* by ratifying the agent's contract. In neither case can the principal be made liable, unless the agent, at the time of the tort or the contract, undertook to act *for him*; but if the agent, though without any precedent authority, did undertake to act *for the principal*, and he subsequently ratify, "in that case," in the language of *Tindal*, C. J., *Wilson v. Tumman*, 6 M. & G. 242, "the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as, by, and with all the consequences which follow from, the same act done by his *previous* authority." *Wilson v. Tumman* was an action of trespass against T., who had ratified the trespass of agents; but they in committing the trespass had not acted for T., but *for another person*, and on this account it was held that T. was not liable. In *Barker v. Braham*, 3 Wils. 376, *De Grey*, C. J., said explicitly, "one assenting to a trespass after it is done is a trespasser." In Co. Litt. 180, b, it is stated, that "if A. disseise one to the use of B., who knoweth not of it, and B. assent to it, in this case, till the agreement, A. was tenant of the land, and after the agreement B. is tenant of the land, but *both of them be disseisors*; for *omnis ratihabitio retrotrahitur et mandato equiparatur*." And where a bailiff seized a beast for a heriot where none was due, and the lord agreed to the seizure and took the beast, the whole court agreed that the lord was liable in trespass, and the only question made was whether the plaintiff might elect to bring trover instead. *Bishop v.*

Montague, Cro. Eliz. 824. See also *Wilson v. Barker*, 4 B. & Ad. 614, 616, where 4 Inst. 317, is cited by *Parke*, J.; *Hull v. Pickersgill*, 1 B. & Bing. 282, 286; *Pollock*, C. B., *Bird v. Brown*, 14 Jur. 134, cited *supra* p. 45, note. This matter of trespass by ratification was very thoroughly discussed, and the law respecting it settled substantially as it has ever since remained, so early as 38 Ed. 3, 18; Lib. Ass. 223, pl. 9, S. C.; and see the resolution of the court stated Bro. Abr. *Ejectione Custodie*, pl. 5, 8, *Trespass*, pl. 113, 256. — As to trespass with battery, or a trespass constituting a statutory offence, see *Bishop v. Montague*, Cro. Eliz. 824; *Hawk. P. C.*, B. 2, ch. 29, § 4; but with this last compare *Goulds*. 42; *Moore*, 53 pl. 155; and Co. Litt. 180, b, note (4.)

An interesting and important question arose in *Buron v. Denman*, 2 Exch. 167. The defendant, a naval commander, stationed on the coast of Africa, with instructions for the suppression of the slave trade, went beyond his instructions in firing the barracks of the plaintiff, a Spanish subject, and carrying off certain slaves of which he was there lawfully possessed. The Lords of the Admiralty and the Secretaries of State for the foreign and colonial departments, respectively, by letter, adopted and ratified what the defendant had done. Held, by *Alderson*, *Platt*, and *Rolfe*, BB., that such ratification was equivalent to a prior command, and rendered what otherwise would have been a trespass on the part of the defendant, an act of state for which the crown was alone responsible. *Parke*, B., doubted: — "I do not say that I dissent; but I express my concurrence with some doubt, because, on reflection, there appears to me a considerable distinction between the present and the ordinary case of ratification by subsequent authority between private individuals.

has been a tendency to discriminate in this respect. To say, for instance, that if A. signs "A. for B.," this is the signature of A., and he is the contracting party, although he makes the contract at the instance and for the benefit of B. But if he signs "B. by A.," then it is the contract of B. made by him through his instrument A. In the first case A. is the principal; in the second B. is the principal and A. his agent. But the recent cases, and the best reasons, are for determining in each instance, and however the signature is made, from the facts and the evidence, that a party is an agent or a principal, in accordance with the intention of the parties to the contract. (x) But it is still requisite that the name of the principal appear in the signature of a deed. (xx) It has been regarded as an established *principle, that no person is held to be the agent of another in making a written contract, unless his agency is stated in the instrument itself, and he therein stipulates for his principal by name. (y) In *Stackpole v. Arnold*, (z) Chief Justice *Parker* considers this rule as applicable to every written contract. But the rule is qualified if not contradicted by authorities of much weight, (a) and we do

If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the crown only (such as it is,) and actually exempts from all liability the person who commits the trespass."

(x) See *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 337; *Long v. Colburn*, 11 Mass. 97; *Abbey v. Chase*, 6 Cush. 54; *Sheldon v. Kendall*, 7 Cush. 217; *Wilks v. Back*, 2 East, 142; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Miller*, 6 B. Mon. 612; *Whitehead v. Reddick*, 12 Ire. L. 95; *McCall v. Clayton*, 1 Busbee's Law, (N. C.) 422; *Sydnor v. Hurd*, 8 Tex. 98; *Johnson v. Smith*, 21 Conn. 627; *Rogers v. March*, 33 Maine, 106; *Southern Ins. Co. v. Gray*, 3 Florida, 262; *Hicks v. Hinde*, 9 Barb. 528. But see *Moss v. Livingston*, 4 Coms. 208. In *Pinckney v.*

Hagadorn, 1 Duer, (N. Y.) 89, an auctioneer had signed his own name to a receipt for the deposit made upon the purchase of real estate sold the plaintiff at auction "for which a good and sufficient title is to be given by J. H. and others;" it was held, that this was a sufficient signing by J. H. *within the statute of frauds*, although his signature did not appear in the subscription.

(xx) *Bac. Abr. Leases*, I. 10; *Clarke v. Courtney*, 5 Peters, 319, 350. See *Beckham v. Drake*, 9 M. & W. 79.

(y) *Long v. Colburn*, 11 Mass. 97; *Magill v. Hinsdale*, 6 Connect. 464; *Hancock v. Fairfield*, 30 Maine, 299.

(z) 11 Mass. 27.

(a) The rule, first advanced, it is believed, by Mr. Smith, (2 Lead. Cases, *Thomson v. Davenport*, *note*,) seems to be adopted by the English Courts. That rule is that parol evidence is always admissible to charge the unnamed principal, though never to discharge the actual signer. *Humble v. Hunter*, 12 Queen's Bench, 310; *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. & El. 594. — In *Beckham v. Drake*, 9 M. & W. 79, where it was decided that a

not regard it as of great force except in cases of sealed in-

partner might be held upon a written contract, signed by his copartners, but in which his name did not appear, Lord Abinger, C.B., and Parke, B., took occasion to consider the case upon the principles of Agency. They admitted that in the case of a *bill of exchange* or *promissory note*, none but the parties named in the instrument by their name or firm, can be made liable to an action upon it, but were of opinion that all other written contracts, not under seal, stand upon the same footing with regard to the parties who may be sued upon them, as contracts not written. The weight of American authority is as yet opposed to the admission of parol evidence to charge an unnamed party. Many of the cases in which this broad doctrine was laid down by our courts, were cases of mercantile paper, yet the decisions evidently were not rested upon the peculiar character of this class of instruments. Whether American courts will be inclined hereafter to follow the English judges, and draw a line of distinction which shall leave ordinary written contracts open to the admission of new parties, remains to be seen. It is certain, however, that considerations deserving great attention may be urged against the admissibility of parol evidence to charge with liability upon a written contract a party not referred to in it. See *Long v. Colburn*, 11 Mass. 97; *Stackpole v. Arnold*, 11 Mass. 27; *Bradlee v. Boston Glass Co.* 16 Pick. 350; *Savage v. Rix*, 9 New Hamp. 263; *Minard v. Mead*, 7 Wend. 68; *Spencer v. Field*, 10 Wend. 87; *United States v. Parmele*, Paine, C. C. 252. In *Finney v. Bedford Commercial Ins. Co.*, 8 Metc. 348, it was held, that when a part-owner of a vessel or its outfits effects insurance thereon in his own name only, and nothing in the policy shows that the interest of any other person is secured thereby, an action on the policy cannot be maintained in the names of all the owners, upon parol evidence that such part-owner was their agent for procuring insurance, and that his agency and their ownership were known to the underwriters, and that the underwriters agreed to insure for them all, and that it was the intention of all the parties, in making the policy, to cover the interest of all the owners. And with this recent

case agrees the decision of the Supreme Court in *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 419, 439. But in *Huntingdon v. Knox*, 7 Cush. 371, which was an action by the plaintiff to recover the price of certain bark sold and delivered to the defendant under a contract in writing, by which one Geo. H. Huntingdon acknowledged to have received of the defendant a partial payment of \$25, and in consideration thereof, agreed to deliver the defendant the bark in question, it was decided that the plaintiff, Mehitabel Huntingdon, might show by parol evidence that the contract was made by Geo. H. Huntingdon on her account, and that the bark delivered was her property, and that she was entitled to recover on the contract. C. J. Shaw relies upon the case of *Higgins v. Senior*, and states the principle broadly thus; "where a contract is made for the benefit of one not named, though in writing, the latter may sue on the contract jointly with others or alone, according to the interest. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts, first, that the act is done in the exercise, and second, within the limits of the powers delegated; and these are necessarily inquirable into by evidence." Considerable stress is however laid upon the fact that this action was not brought upon the written contract itself, but for the price of goods sold by the agent, from which the promise to pay implied by law, although *primâ facie* to the agent, might be controlled by parol evidence that the contract was for the sale of property belonging to the principal and sold by her through her agent. Upon this distinction this case may be reconciled with *Finney v. Bedford Commercial Ins. Co.*, which was not, however, alluded to in the case. *Newcomb v. Clark*, 1 Denio, 226, was an action by C. upon an agreement in writing with P., who, it was in proof, was C.'s agent. Held, that an action upon an express contract, (not being a negotiable instrument,) must be brought in the name of the party with whom it was made; and it is not competent to show by parol that the promisee was the agent of another person

struments. (b) Indeed, Chief *Justice *Parker*, in the later case of *New England Marine Ins. Co. v. De Wolf*, (c) seems to confine it to these cases.

SECTION. V.

DURATION AND EXTENT OF AUTHORITY.

Where there is an authority expressly given or implied by law, it is important to determine its extent, scope, and duration. Where a principal has held one out as his general

for the purpose of enabling such person to maintain an action. And in *Fenly v. Stewart*, 5 Sandf. 101, which was an action of assumpsit to charge the defendants as principals upon a contract with A. W. Otis & Co., to deliver 25,000 bushels of oats to the plaintiffs, and in which the Messrs. Otis were introduced, and testified that at the time they signed the written agreement for the sale and delivery of the oats in their own name they were the agents of the defendants; it was decided that the plaintiffs could not recover, and the court, denying the *dictum* of Baron *Parke*, in the case of *Higgins v. Senior*, that it is competent by parol proof to charge a party upon a contract in writing made by another person in his own name, stated the rule to be, "that where a contract is reduced to writing, whether in compliance with the requisitions of the statute of frauds or not, and it is necessary to sue upon the writing itself, there you cannot go out of the writing, or contradict or alter it by parol proof, and consequently cannot recover against a party not named in the writing; but where the contract of sale has been executed so that an action may be maintained for the price of the goods irrespective of the writing, there the party who has had the benefit of the sale may be held liable, unless the vendor, knowing who the principal is, has elected to consider the agent his debtor." The true principle upon which this seeming contrariety of opinion may be reconciled, would appear to be that laid down in this case of *Fenly v. Stewart*, and may be stated thus; where a

contract is reduced to writing, and an action is brought upon the writing itself, no other persons can be made parties than those named in the instrument, but when a right of action exists independent of the writing, which is merely offered as evidence tending among other things, to establish that right, then the party having the legal interest or liability, and for whom the contract was actually made, may sue or be sued, although not named in the writing. But *Hubbert v. Borden*, 6 Whart. 79; *Violet v. Powell*, 10 B. Mon. 347; *Brooks v. Minturn*, 1 Cal. 481; and *Cothay v. Fennell*, 10 B. & Cress. 671, are authorities to show that an unnamed principal may come in to take the benefit of a written contract with an agent, who acted in his own name.

(b) *Evans v. Wells*, 22 Wend. 324; *Pinckney v. Hagadorn*, 1 Duer, (N. Y.) 89; *Andrews v. Estes*, 2 Fairfield, 267. The undisclosed principal, however, can never come in and take advantage of a written contract entered into by his agent in a case where the latter has distinctly described himself in the writing as principal. *Lucas v. De La Cour*, 1 M. & Sel. 249; 2 Greenl. Evid. § 281. In *Humble v. Hunter*, 12 Queen's Bench, 310, which was an action of assumpsit on a charter-party executed, not by the plaintiff, but by a third person, who in the contract described himself as "owner" of the ship, it was held, that evidence was not admissible to show that such person was the plaintiff's agent.

(c) 8 Pick. 56; and see *Northampton Bank v. Pepon*, 11 Mass. 288, 292.

agent, or authorized parties so to regard him by continued acquiescence and confirmation, we have said that the principal cannot limit or qualify his own liability by instructions, or limitations, given by him to his agent, and not made known in any way to parties acting with such agent. (d) And where an agent is employed to transact some specific business, and only that, yet he binds his principal by such subordinate acts as are necessary to, or are usually and properly done in connection with the principal act, or to carry the same into effect. (e) But an agent is not at liberty to exercise his discretion in the choice of a mode of performing the duty imposed upon him; for he must adopt that mode, and that only, which, if he be a general agent, is fixed either by usage or by the orders of his principal, or, if he be a particular agent, by his principal's orders alone. (ee) An authority to sell does not carry with it *authority to sell on credit, unless such be the usage of the trade; but if there be such usage, then the agent may sell on credit unless specially instructed and required to sell only for cash. (f)

(d) *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400; *Commercial Bank v. Kortright*, 22 Wend. 348; *Munn v. Commission Co.* 15 Johns. 44; *Hatch v. Taylor*, 10 New Hamp. 538; *Lobdell v. Baker*, 1 Metc. 193; *Nickson v. Brohan*, 10 Mod. 109; *Runquist v. Ditchell*, 3 Esp. 64; *Precious v. Abel*, 1 Esp. 350; *Lloyd v. West Branch Bank*, 15 Penn. 172; *Chouteaux v. Leach*, 18 Penn. 224. — *E converso*, it would seem that a third party dealing with an agent cannot have the benefit against the principal of a private arrangement between the latter and the agent, of which such third party neither knew nor was entitled to know. See *Acey v. Fernie*, 7 M. & W. 151.

(e) *Tredwen v. Bourne*, 6 M. & W. 461; *Lord Ellenborough, Helyear v. Hawke*, 5 Esp. 75; *Withington v. Herring*, 5 Bing. 442; *Goodson v. Brooke*, 4 Camp. 163; *Barnett v. Lambert*, 15 M. & W. 489; *Denman v. Bloomer*, 11 Ill. 177. So where the Government is the principal and a statute the letter of authority. *United States v. Wyngall*, 5 Hill, 16. — If a party authorizes a broker to buy shares for him in a par-

ticular market, where the usage is, that when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. *Pollock v. Stables*, 12 Queen's Bench, 765; *Bayliffe v. Butterworth*, 1 Exch. 425.

(ee) *Daniel v. Adams*, Ambl. 495. And the *incidental* means the agent resorts to in carrying out his authority must be those which *usually* attend an agency of that kind: if an extraordinary exigence occur he has no right to have recourse to extraordinary means to meet it. *Hawtayne v. Bourne*, 7 M. & W. 595.

(f) *Holt*, C. J., Anon. 12 Mod. 514; *Lord Ellenborough, Wiltshire v. Sims*, 1 Camp. 258; *Van Alen v. Vanderpool*, 6 Johns. R. 69; *Robertson v. Livingston*, 5 Cow. R. 473; *James v. McCredie*, 1 Bay, 294; *Delafield v. Illinois*, 26 Wend.

And if he sells for credit, having no authority to do so, he becomes personally responsible to his principal for the whole debt. (g) So is he also if he blends the accounts of his principal with his own, or takes a note payable to himself. (h)

* If an agent to whom goods are intrusted for a particular purpose, sell the same to a person, or in a manner not within the scope of his authority, the principal may disaffirm the sale and recover the goods of the vendee, if he have not justified the vendee in believing the authority of the agent. (i) If the power of an agent be given by a written instrument, which instrument is known to the party contracting with him, such

223; *Mellen, J.*, in *Greely v. Bartlett*, 1 Greenl. R. 172, 179, stated the rule of the law merchant to be that a factor may sell the goods of his principal on a reasonable credit *unless* restrained by instructions or a special usage.

(g) *Barksdale v. Brown*, 1 Nott & McCord, 517; *Walker v. Smith*, 4 Dallas 389. And the principal may also maintain trover against the vendee. *Holt, C. J.*, Anon. 12 Mod. 514; and see *Wiltshire v. Sims*, 1 Camp. 258. — An agent to sell has no power to barter, and if he undertake to do so, the principal may recover the goods, although the party receiving them was ignorant that the agent was not the owner. *Guerreiro v. Peile*, 3 B. & Ald. 616. — A simple authority to sell will not authorize a sale at auction. *Towle v. Leavitt*, 3 Foster (N. H.) 360. — And it seems an authority to sell at auction will not support a private sale, although more be thus obtained than the agent was limited to in case of an auction sale. *Daniel v. Adams*, Ambl. 495. — At common law an agent cannot pledge the goods of his principal without special authority. *Paterson v. Tash*, 2 Stra. 1178; *Daubigny v. Duval*, 5 T. R. 604; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Rodriguez v. Hefferman*, 5 Johns. Ch. 417; *Bott v. McCoy*, 20 Ala. 578. This has been modified in England by various statutes, (4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39.) See *Navulshaw v. Brownrigg*, 7 E. L. & E. 111; s. c. 13 E. L. & E. 261. And in several States of this Union statutory enactments have been made providing that any consignee, agent, or factor, having possession of merchandise with authority to sell the same, or having possession of any bill of lading, permit, certificate,

or order for the delivery of merchandise with the like authority, shall be deemed the true owner thereof so as to give validity to the sale, disposition, or pledge of such merchandise, as security for any advances, negotiable paper, or other obligation given on faith thereof. *Maine R. S.* (1841) ch. 43, sect. 2; *Mass. Suppl. to R. S.* ch. 216, sect. 3; *Pub. Laws of R. I.* (1844) p. 280, sect. 2; *N. Y. R. S.* (1846) vol. ii. part 2, ch. 4, tit. v. § 1-3; *Laws of Penn.* (1846) ch. ccccxvii. 3. — By the statutes of some of the States the pledgee cannot retain the merchandise if he had notice that the factor was not the true owner before he made the advances, for which the merchandise was pledged as security. But the statute of *Mass.* provides that the pledge shall hold good, "notwithstanding the person making such advances upon the faith of such deposit or pledge may have had notice that the person with whom he made such contract was only an agent," provided the pledgee made the advances in good faith, believing that the agent had authority to enter into the contract. — If the merchandise was pledged to secure *antecedent* advances, the pledgee acquires no other right or interest in the pledge than was possessed or could have been enforced by the agent or factor at the time of making the pledge. *Maine R. S.* (1841) ch. 43, sect. 3; *Mass. Sup. to R. S.* ch. 216, sect. 4; *Pub. Laws of R. I.* (1844) p. 280, sect. 3; *N. Y. R. S.* (1846) vol. ii. part. 2, ch. 4, tit. 5. § 4; *Laws of Penn.* (1846) ch. ccccxvii. 4.

(h) *Symington v. McLin*, 1 Dev. & Bat. 291. See *post* page 81 (j.)

(i) *Peters v. Ballistier*, 3 Pick. 495; *Nash v. Drew*, 5 Cush. 422.

instrument must be followed strictly, and cannot be varied or enlarged by evidence of usage. (*j*) An agent employed to answer particular questions, and withholding some facts material to the contract, about which no questions are asked, does not thereby vitiate the contract; (*k*) it would be otherwise if such agent were employed to make the contract. (*l*)

It has been held that a power to sell carries with it a power to warrant; (*m*) but we think it the better rule, that an agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty, in which case he may. (*n*) And in such case, if the principal gives his agent express instructions not to warrant, and the agent does warrant, although it has been said that such warranty is not binding on the principal, on the general ground that no principal is bound by the acts of his agent if such acts transcend his authority, (*o*) yet the better opinion is that the principal is bound by such warranty, where the buyer was justified by the nature of the case in believing that this authority was given and had no means of knowing the limitation of the * authority of the agent. (*p*) The usage of the trade or busi-

(*j*) *Delafield v. Illinois*, 26 Wend. 192.

(*k*) *Huckman v. Fernie*, 3 M. & W. 505.

(*l*) *Everett v. Desborough*, 5 Bing. 503; *Fitzherbert v. Mather*, 1 T. R. 12.

(*m*) *Nelson v. Cowing*, 6 Hill, N. Y. 336; *Woodford v. McClenahan*, 4 Gilman, 85; *Hunter v. Jameson*, 6 Iredell, 252.

(*n*) *Gibson v. Colt*, 7 Johns. 390; *Helyear v. Hawke*, 5 Esp. 72; *Croom v. Shaw*, 1 Flor. 211. A sale by sample is a warranty that the bulk shall correspond with the sample; and a general authority to sell goods at wholesale is an authority to sell by sample. *Andrews v. Kneeland*, 6 Cowen, 354. An agent to sell a horse may warrant his soundness. *Alexander v. Gibson*, 2 Camp. 555; *Bradford v. Bush*, 10 Alabama, 386. In Alabama an authority to sell a slave has been held to imply an authority to warrant. *Skinner v. Gunn*, 9 Porter, 305; *Gaines v. McKinley*, 1 Alabama, 446. But an agent to

deliver has no authority to warrant. *Woodin v. Burford*, 2 Cr. & M. 291, 4 Tyr. 264. In judicial sales there is no warranty express or implied. *The Monte Allegre*, 9 Wheat. 616.

(*o*) *Lord Kenyon*, *Fenn v. Harrison*, 3 T. R. 760; *Dodderidge*, C. J., *Seignior and Wolmer's case*, Godbolt, 361.

(*p*) *Ashurst*, J., *Fenn v. Harrison*, 3 T. R. 760, who said, "I take the distinction to be that if a person keeping livery-stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would

ness is of great importance in determining these questions; but one distinction seems to be taken between the case of a *written* authority and that of an *oral* authority, namely, where the authority is oral and is known to the party dealing with the agent, usage may enlarge and affect the contract; but, as has been already stated, usage has not this power where the whole authority is in writing, and is known as such to the party dealing with the agent. (q)

If a principal sells goods by an agent, and the agent makes a material misrepresentation which he believes to be true, and his principal knows to be false, this is the falsehood of the principal and avoids the sale. (r)

not be liable on the warranty, because the servant was not acting within the scope of his employment." So per *Bayley, J.*, *Pickering v. Busk*, 15 East, 45.

(q) *Attwood v. Munnings*, 7 B. & Cress. 278; 1 M. & Ryl. 66, S. C.; *Schimmelpennich v. Bayard*, 1 Peters, 264.

(r) *Schneider v. Heath*, 3 Camp. 506. And this is true although the representations are of such a character that the principal is not bound by them; for, as was said by Lord *Abinger* in *Cornfoot v. Fowke*, 6 M. & W. 386, "it does not follow that because he is not bound by the representation of an agent without authority, he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. It is one thing to say that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and another to say that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority." *Cornfoot v. Fowke*, 6 M. & W. 358, was an assumpsit for the non-performance of an agreement to take a ready-furnished house. The plaintiff had employed C. to let the house in question, and the defendant being in treaty with C. for taking it, was informed by him that there was no objection to the house; but after entering into the agreement discovered that the adjoining house was a brothel, and on that account declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C.,

the agent, did not. The majority of the court held, contrary to the opinion of Lord *Abinger*, C. B., that these facts furnished no ground of defence to the action. This case has been very much questioned from the first, and was overruled in *Fuller v. Wilson*, 3 Queen's Bench, 58. The judgment in the latter case was indeed reversed in the Exchequer Chamber, 3 Q. B. 68, but not on this point; Lord *Abinger* there saying, 3 Q. B. 76, "The judgment of the Court of Queen's Bench on the motion to enter a verdict was not given upon the facts now before us. We shall not reverse that if we give judgment now for the plaintiff in error." In this country, *Cornfoot v. Fowke* was denied to be law by the court in *Fitzsimmons v. Joslin*, 21 Verm. 129. And in *Crump v. U. S. Mining Co.*, 7 Grattan, 352, where the plaintiffs authorized their agent to procure subscriptions to a prospectus in the form of a subscription paper for the sale of stock in their gold mining company upon the terms prescribed in such prospectus, representing the mines to be in full and successful operation, with several particulars of description and recommendation and referring to the last report of the directors of the company for a full description of the mines, buildings, and machinery, which paper was signed by the defendants; it was held that they might in an action upon the contract prove that the agent at the time of procuring their subscriptions, made representations in addition to those contained in the prospectus and reports of the company, upon the faith of which the defendants became sub-

SECTION VI.

THE RIGHT OF ACTION UNDER A CONTRACT.

In contracts by deed no party can have a right of action under them but the party whose name is to them; (s) but in the case of a simple contract an undisclosed principal may show that the apparent party was his agent, and may put himself in the place of his agent, (t) but not so as to affect injuriously the rights of the other party. (u) How far this rule is affected by the Statute of Frauds will be considered hereafter. (v) By parity of reasoning, an undisclosed principal, subsequently discovered, may be made liable on such contract; (w) but in general, subject to the qualification that the state of the account between the principal and agent is not altered to the detriment of the principal. (x) It might be supposed that the party dealing with an agent whose agency is concealed, does not lose his election to have recourse either to the agent, or to his discovered principal, if the prin-

scribers, but which representations were false and fraudulent; although it was insisted by the plaintiffs that the authority of their agent was limited and defined by the prospectus and report.

(s) *Green v. Horne*, 1 Salk. 197; *Frontin v. Small*, 2 Ld. Raym. 1418.

(t) *Skinner v. Stocks*, 4 B. & Ald. 437; *Cothay v. Fennell*, 10 B. & Cress. 671; *The Duke of Norfolk v. Worthy*, 1 Camp. 337; *Garrett v. Handley*, 4 B. & Cress. 664; *Davis v. Boardman*, 12 Mass. R. 80; *Rutland Railroad v. Cole*, 24 Verm. 33; *Higgins v. Senior*, 8 M. & W. 834; *Whitmore v. Gilmour*, 12 M. & W. 808, where a bankrupt, under the circumstances of the case, was considered agent for his assignees.

(u) *George v. Clagett*, 7 T. R. 359; *Sims v. Bond*, 5 B. & Ad. 389; *Warner v. McKay*, 1 M. & W. 591; *Huntingdon v. Knox*, 7 Cush. 371; *Violett v. Powell*, 10 B. Mon. 349. And see *Harrison v. Ruscoe*, 15 M. & W. 231.

(v) And see p. 48* note (a) *supra*. See also *Bank of United States v. Lyman*, in United States Circuit Court, 1848, (reported 20 Verm. 666, 673, 674,) where the doctrine of Lord *Abinger* and

Baron *Parke* in *Beckham v. Drake*, 9 M. & W. 79, was recognized by *Pren-tiss*, J.

(w) *Thompson v. Davenport*, 9 B. & Cress. 78; *Cothay v. Fennell*, 10 B. & Cress. 671; *Thomas v. Edwards*, 2 M. & W. 216; *Beebe v. Robert*, 12 Wend. 413; *Upton v. Gray*, 2 Greenleaf, R. 373; *Nelson v. Powell*, 3 Doug. 410; *Hopkins v. Lacouture*, 4 Louis. 64; *Hyde v. Wolf*, 4 Louis. 234; *Bacon v. Sondley*, 3 Strob. L. 542.—The party dealing with the agent may, when he discovers the principal, charge either at his election. *Thompson v. Davenport*, 9 B. & C. 78; *Wilson v. Hart*, 7 Taunt. 295; *Railton v. Hodgson*, 4 Taunt. 576, note (a); *Robinson v. Gleadow*, 2 Bing. N. C. 161; *Paterson v. Gandesequi*, 15 East, 62; *Higgins v. Senior*, 8 M. & W. 834. But where a vendor takes the note of the agent, which shows him to rely upon the agent, he cannot afterwards sue the principal. *Paterson v. Gandesequi*, 15 East, 62; *Hyde v. Paige*, 9 Barb. 150; *Bate v. Burr*, 4 Harring. 130.

(x) *Thomson v. Davenport*, 9 B. & Cress. 78; *Lord Ellenborough*, *Kymer v. Suwercropp*, 1 Camp. 109.

principal has *prematurely* settled with his agent, even without fraud; as where the agent bought on one month's credit and the principal paid him before the credit had expired. (y) But it may be open to question whether such settlement by *the principal, although premature, if perfectly *bonâ fide*, in the course of business, and free from all suspicion that it had been hastened for the purpose of interfering with the seller, would not discharge the principal. We think it would.

SECTION VII.

LIABILITY OF AN AGENT.

An agent is not personally liable, unless he transcends his agency, or departs from its provisions, (z) or unless he expressly pledges his own liability, (a) or unless he conceals his character of agent, (b) or unless he so conducts as to

(y) *Kymer v. Suwercropp*, 1 Camp. 109; *Waring v. Favenck*, 1 Camp. 85.

(z) *Feeter v. Heath*, 11 Wend. 477; *Johnson v. Ogilby*, 3 P. Wms. 279; *Jones v. Downman*, 4 Queen's Bench, 235, note (a). The decision of the Queen's Bench in this case was afterwards reversed in the Exchequer Chamber on a special ground, but the doctrine of law does not seem to be impugned. — But the departure from authority, to charge the agent, must not be known to the other contracting party. Story on Agency, § 265, recognized by Lord Denman, *Jones v. Downman*, 4 Q. B. 239.

(a) If an agent, executing a contract in writing, use language whose legal effect is to charge him personally, it is not competent for him to exonerate himself by showing that he acted for a principal, and that the other contracting party knew this fact at the time when the agreement was made and signed. *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littledale*, 6 Ad. & Ell. 486; *Higgins v. Senior*, 8 M. & W. 834; *Appleton v. Binks*, 5 East, 148, which was the case of a contract under seal; *Chadwick v. Madon*, 12 E. L. & E. 180; *Hancock v. Fairfield*, 30 Maine, 299.

See also *Duvall v. Craig*, 2 Wheat. 56; *Tippets v. Walker*, 4 Mass. 595; *Forsster v. Fuller*, 6 Mass. 58; *White v. Skinner*, 13 Johns. 307; *Stone v. Wood*, 7 Cowen, 453; *Andrew v. Allen*, 4 Harring. 452; *Potts v. Henderson*, 2 Cart. (Ind.) 327; *Fash v. Ross*, 2 Hill, (S. Car.) 294.

(b) *Franklyn v. Lamond*, 4 Com. Bench, 637, where it was held that the fact of selling *as auctioneers* was not such an indication of agency as to absolve the defendants from personal responsibility. — In an action for use and occupation of lands by the sufferance and permission of the plaintiffs, it appeared that the lands were let by auction by the plaintiffs, E. and T., who were auctioneers, to the defendant, under conditions which stated the letting to be "By E. and T., auctioneers." One of the conditions was, "The rent is to be paid into the hands of E. or T., auctioneers, or to their order, at two payments," &c. At the foot of the document was written, "approved by me, David Jones." Jones was the tenant at the time of the sale. Nothing else appeared in the conditions to show on whose behalf the letting was. The plaintiffs gave evidence to show that Jones, being indebted to them, had au-

render his principal inaccessible or irresponsible, (c) or unless he acts in bad faith. If he describes himself as agent for some unnamed principal he is of course liable if proved to be the real principal. (cc) And one acting as agent is liable personally, if it be shown that he acts without authority. (d) Whether an agent makes himself liable who transcends his authority, or acts without authority, but believes in good

thorized them to let the lands as above, pay the rent due to Jones's landlord, and retain any surplus in satisfaction of their own debt. Evidence to a contrary effect was given by the defendant. The judge in summing up left it to the jury whether the plaintiffs had let the lands on their own behalf and as creditors of Jones, or merely as his agents. The jury found a letting by the plaintiffs on their own behalf. *Held*, that the conditions imported a letting by Jones, E. and T. acting as his agents; and that the document ought to have been so explained to the jury. And a new trial was granted. *Evans v. Evans*, 3 A. & El. 132.—The agent is perhaps, in like manner liable (at the option of the party contracting with him) if he do not state the name of the principal, and notwithstanding the other contracting party have the means of knowing the principal. *Thomson v. Davenport*, 9 B. & Cress. 78; *Owen v. Gooch*, 2 Esp. 567; *Raymond v. Proprietors of Crown and Eagle Mills*, 2 Metc. 319; *Winsor v. Griggs*, 5 Cush. 210; *Taintor v. Prendergast*, 3 Hill, 72.

(c) *Ashurst, J., Fenn v. Harrison*, 3 T. R. 761; *Savage v. Rix*, 9 New Hamp. 263; *Sydnor v. Hurd*, 8 Tex. 98; *Keener v. Harrod*, 2 Maryl. 63.

(cc) *Schmalz v. Avery*, 3 E. L. & E. 391; *Carr v. Jackson*, 10 E. L. & E. 526.

(d) *Dusenberry v. Ellis*, 3 Johns. Cas. 70; *Bayley, B., Thomas v. Hewes*, 2 C. & Mee. 530, note (a). And a subsequent ratification it seems will not (always at least) excuse him. *Rossiter v. Rossiter*, 8 Wend. 494; *Palmer v. Stephens*, 1 Den. 471.—If A., supposing B. to be agent for C. in the matter, enter with him into a contract which is illegal if the contract of C., but is not illegal if B.'s personal contract, and it turn out that B. acted without authority, the illegality of the supposed contract is no bar to an action by A. against B.; for the contract *actually made* contained no ille-

gality. *Parke, B., Thomas v. Edwards*, 2 M. & W. 217.—It is perhaps doubtful whether or not a party contracting, without authority, as agent for another, and giving the name of the principal, can afterwards himself enforce the contract as principal. Strictly, it would seem he cannot. Even admitting that the agent thus acting without authority, might be held *liable* upon the contract as principal, because he acted in his own wrong, yet it does not follow that he himself should be allowed to take advantage of the wrong. And this appears to have been the view of Lord *Ellenborough, C. J.*, and *Abbott, J.*, in *Bickerton v. Burrell*, 5 M. & Sel. 383; though the decision in that case was put on the narrower, and somewhat unsatisfactory ground, that the plaintiff had not *notified* the defendant, previous to bringing the action, of his claim to the character of principal.—If the other party, after knowledge of the true state of the matter, elect to act under the contract, it is clear that he has waived his right to object that it was not made originally with the plaintiff as principal. In *Rayner v. Grote*, 15 M. & W. 359, the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of J. & T.; the buyers accepted part of the goods, and the plaintiff (who in reality was himself principal in the transaction, and not agent for J. & T.) brought an action in his own name against the buyers for refusing to accept the remainder. At *nisi prius* the jury were instructed that if the defendants received the first portion of goods, with knowledge that the plaintiff was the real seller, and all parties then treated the contract as one made with the plaintiff as principal in the transaction, the plaintiff was entitled to recover, and upon this instruction a verdict having been rendered for the plaintiff, the court held that the case was properly left to the jury, and refused to disturb the verdict.

faith 'that he has such authority, may be not absolutely settled. It must depend upon the question whether he is regarded as always warranting his possession of authority. Where an agent fraudulently * misrepresents his authority, with the purpose of deception, there it is equally clear that he is liable *legally* as it is that he is liable *morally*. But where he verily believes himself to possess the authority under which he acts, but is mistaken on this point, then a deciding test of his liability may perhaps be found in his means of knowledge. If he could have known the truth and did not through his own fault, then he is ignorant by his own wrong. And if an injury is to result from this ignorance, either to a third party or to him, and the third party is wholly innocent, it ought to fall on him who so represented himself as agent, because he was not therein wholly innocent. He was not guilty of intentional deception, but he was guilty of deception in fact, and if this was caused by his want of care or want of diligence, or by his negligence in any way, he must bear the burden of it. And this is what we should infer from some of the cases in which it is said that an agent who states that which he does not know to be true, places himself under the same liability as one who states what he knows to be not true. It may be meant that he states what he does not know to be true, and by proper diligence and care might have known to be not true. But the question still remains, whether the agent is liable where he himself has been deceived wholly without his fault,—as by a forged letter which he could not detect. The case must be very rare in fact, where one acting as an agent is wholly without the means of ascertaining his own agency. But we incline to the opinion, as resting on the better reason, that he would still be held. If he and the third party with whom he deals, are both perfectly innocent, still the loss resulting from his want of authority must fall somewhere; and it seems just that it should rest on him who has assumed, innocently but yet falsely, that he possessed this authority. (e)

(e) In *Polhill v. Walter*, 3 B. & Ad. 114, the right of action is held to be grounded on an affirmation of authority

which the affirmer knew to be false; and if he acted under an authority which was forged, but which he believ-

The question then occurs whether in such a case the agent can be held *on the contract*, and it has been so decided. (f)

ed genuine, he would not be responsible. Story (Agency, sect. 263, note 2,) says, "the distinction of Lord *Tenterden* (in the above case,) is entirely overthrown by *Smout v. Ilbery*, 10 Mees. & W. 1." We do not so understand this case. There the family of Mr. Ilbery was supplied with provisions by Smout. Ilbery was lost in a voyage to India, in Oct. 1839; the provisions were supplied both before and after his death; and the action was brought against the widow. A principal question was, whether she was liable for the provisions supplied after the death of Ilbery, and before it was known. *Alderson*, B., in giving the opinion of the court, says, "There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part — no want of due diligence in acquiring knowledge of the revocation — no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God." On this ground she was held not liable. But he says previously "that where a party making the contract as agent, *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds, that the statement will ultimately turn out to be correct." It cannot be doubted, however, that the court intend to confine the liability of the supposed agent to the case where he not only had no authority, but might have known that he had none. This may not only be inferred from the decision, but the court say afterwards, "If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him

personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come." We doubt, however, the law of this case, and prefer the view stated in the text.

(f) This question has been very recently discussed in the Queen's Bench in the case of *Jenkins v. Hutchinson*, 13 Jur. 763; s. c. 13 Q. B. 744. That was an action of assumpsit on a charter-party, which purported to be made between the plaintiff on the one part, and one T. A. Barnes of the other part, and was signed "Ralph Hutchinson, for T. A. Barnes." It appeared that Hutchinson had no authority to enter into the charter-party for Barnes, and it was therefore contended that he was personally liable as principal in this action, but the court held otherwise. Lord *Denman* said:—"It is not pretended that the defendant had any interest as principal; he signed as agent, intending to bind a principal, and in no other character. That he may be liable to the plaintiff in another form of action, for any damage sustained by his representing himself to be agent, when he was not, is very possible; but the question is here, whether he can be sued on the charter-party itself, as a party to it. No reported case has decided that a party so circumstanced can be sued on the instrument itself. Mr. Justice *Story*, in his book on the Law of Agency, states that the decisions in the American courts are conflicting on this point, and that 'in England it is held, that the suit must be by a special action on the case;' citing *Folhill v. Walter*, 3 B. & Ad. 114. That case does not, perhaps, establish the broad proposition; for the contract was a bill of exchange — an instrument differing in many respects from ordinary contracts. In the absence of any direct authority, we think that a party who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name only as agent for that other, cannot be treated as a party to that instrument, and be sued upon it, unless it be shown that he was the *real principal*." See also *Lewis v. Nicholson*, 12 E. L.

But *we think it the better opinion that the contract is wholly void. It is not the contract of the principal, because he gave no authority to the supposed agent. It is not the contract of the agent, for he professed to act for the principal. So, if one forges a signature to a note, and obtains money on that note, he cannot be held on it as on his promise to pay. But in all such cases the supposed agent may be reached in assumpsit if money be paid to him or work and labor done for him under such supposed contract, or in trespass for special damages for so undertaking to act for another without authority, or in some other appropriate action; but not on the contract itself.

An agent who exceeds his authority renders himself liable

& E. 430. — The law is so held in Massachusetts. *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Jefts v. York*, 4 Cush. 371. And in *Abbey v. Chase*, 6 Cush. 56, the view taken in the text is confirmed. The Court say, "It does not necessarily follow that a contract made by an authorized agent, which does not bind the principal, becomes the agent's contract, and makes him answerable if it is not performed. This depends upon the legal effect of the terms of the contract. If the agent employs such terms as legally import an undertaking by the principal only, the contract is the principal's, and he alone is bound by it. But if the terms of the contract legally import a personal undertaking of the agent, and not of the principal, then it is the contract of the agent, and he alone is answerable for a breach of it. So when one who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contain apt words to bind him personally. The only remedy against him in this commonwealth, is an action on the case for falsely assuming authority to act as agent." In Maine, *Harper v. Little*, 2 Greenl. 14; *Stetson v. Patton*, 2 Greenl. 358. In Connecticut, *Ogden v. Raymond*, 22 Conn. 385. In Indiana, *McHenry v. Duffield*, 7 Blackf. 41. And in Pennsylvania, *Hopkins v. Mehaffy*,

11 S. & R. 126. In this case *Gibson, J.*, says, "No decision can be found in support of the position, that what appears on the face of the deed to be the proper covenant of the principal, but entered into through the agency of an attorney, shall be taken to be the proper covenant of the attorney, whenever he had not authority to execute the deed. How could he be declared against? If in the usual and proper manner of pleading it were alleged, that the agent had covenanted, it would appear by the production of the instrument that he had not, but that his principal had covenanted through his means; which, on *non est factum* being pleaded, would be fatal." But in New York the courts have held the agent personally liable on the contract in such cases. *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *White v. Skinner*, 13 Johns. 307; *Randall v. Van Vechten*, 19 Johns. 60; *Meech v. Smith*, 7 Wend. 315; *Palmer v. Stephens*, 1 Denio, 471. But see *Walker v. Bank of the State of New York*, 13 Barb. 639, *contra*. The agent is held liable on the contract in New Jersey, *Bay v. Cook*, 2 N. J. 343. In New Hampshire the court seem to have taken a middle course. It is there held that if a person, having no authority to act as agent, undertakes so to act in making a contract, and the contract which he makes, *rejecting what he was not authorized to put to it*, contains apt words to charge himself, he is personally liable. *Woodes v. Dennett*, 9 N. H. 55; *Savage v. Rix*, 9 N. H. 263.

to the whole extent of the contract, although a part of it was within his authority. (g)

SECTION VIII.

REVOCATION OF AUTHORITY.

It is a general principle, that an authority is always revocable; the principal may at any time put an end to the relation between himself and his agent by withdrawing the authority. (h)

(g) *Feeter v. Heath*, 11 Wend. 477. But in *Johnson v. Blasdale*, 1 Smedes & Marshall, 1, the Court of Appeals of Mississippi held that if an agent in filling up a blank note exceed his authority, and the third party receive the note with knowledge that the authority has been transcended, the note will not be void *in toto*, but only for the excess beyond the sum which was authorized.

(h) Unless the authority be *coupled with an interest*, or given for *valuable consideration*. It is to be noticed, that many cases which in England might be understood as examples of an authority irrevocable at the pleasure of the principal, because coupled with an interest, would not in this country be classed under that head, owing to the general adoption here of the definition of a "power coupled with an interest," given in *Hunt v. Rousmanier*, 8 Wheat. 201, (see *post*, n. (m.)) All such cases, it seems, can be considered instances where the authority cannot be revoked because of the *valuable consideration* moving from the agent; as where the agent had begun to act under the authority, and would be damnified by its recall, or where the authority is part of a security. *Walsh v. Whitcomb*, 2 Esp. 565; *Gausson v. Morton*, 10 B. & Cress. 731; *Hodgson v. Anderson*, 3 B. & Cress. 842; *Broomley v. Holland*, 7 Ves. 28; *Marryat v. Broderick*, 2 M. & W. 371; *Eltham v. Kingsman*, 1 B. & Ald. 683; *Yates v. Hoppe*, 9 Com. Bench 541; *Ware, J., United States v. Jarvis*, Dist. Court of Maine, 1846; 4 N. Y. Leg. Obs. 301. And see *Brown v. McGran*, 14 Pet. 479, 495; *Story on Agency*, § 466, 467, 468, where the opinions of the civilians are cited; but compare 2 Kent, Comm. 644. *Fabens v. The Mercantile Bank*, 23 Pick. 330,

seems to be the case of a power irrevocable by the principal, both because given for consideration and because coupled with an interest in the sense of Chief Justice Marshall. — Whether after advances made by a factor, his authority to sell the goods of the principal to the extent of those advances, is revocable at the pleasure of the principal, is a question upon which the authorities are not agreed. In *Brown v. McGran*, 14 Pet. 479, it was held that the authority to sell is not revocable in such a case. The decisions in the State Courts, so far as they go, appear to be in substantial agreement with *Brown v. McGran*. If the original authority, on consideration of which the advances were made, was an authority to sell at a *limited price*, it seems plain that the fact of the advances does not alter that authority. It continues an authority to sell on certain terms, and as such, on the doctrine of the Supreme Court, may be held irrevocable to the extent of the consideration given for it, *i. e.* to the amount of the advances. Some of the State courts have gone a step farther in this direction, and held that an authority to sell at a limited price may be converted into a *general* authority to sell, by the fact of advances in conjunction with the fact of the neglect of the consignor, after reasonable notice, to repay the advances. *Parker v. Branker*, 22 Pick. 40; *Frothingham v. Everton*, 12 N. H. 239. See also *Blot v. Boiceau*, 3 Comst. 78. — This subject has recently come before the Court of Common Bench in England in *Smart v. Sanders*, 5 C. B. 895, where it was decided that a factor's authority to sell is revocable at the will of the consignor, notwithstanding advances to the full value, and a request of re-

But where third parties have dealt with an agent clothed with general powers, whose acts have therefore bound his principal, and the principal revokes the authority he gave his agent, such principal will continue to be bound by the farther acts of his agent, unless the third parties have knowledge of the revocation, or unless he does what he can to make the revocation as notorious and generally known to the world as was the fact of the agency. (i) This is usually done by * advertising, and usage will have great effect in determining whether such principal did all that it was incumbent on him to do to make his revocation notorious. And third parties who never dealt with such agent before such revocation, if they as a part of the community were justified in believing such agency to have existed, and had no knowledge and no sufficient means of knowledge of the revocation, may hold the principal liable for the acts of the agent after revocation; (j) as in the case of a partnership, where the

payment uncomplished with. *Brown v. McGran* had been cited in the argument; *Wilde, C. J.*, delivering the judgment of the court, said, (p. 918,) "In the present case the goods are consigned to a factor for sale. That confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest but an independent authority, and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independently of agreement. There is no authority or principle in our law, that we are aware of, which leads us to think it will. If such be the law, where is it to be found? It was said in argument, that it was the common practice of factors to sell, in order to repay advances. If it be true that there is a well-understood practice with factors to sell, that practice might furnish a ground for inferring that the advances were made upon the footing of an agreement that the factor should have an irrevocable authority to sell, in case the principal made default. Such an inference might be a very reasonable and proper one; but it would be an inference of

fact, and not a conclusion of law." See also *Raleigh v. Atkinson*, 6 M. & W. 670.

(i) *Hazard v. Treadwell*, Stra. 506; — *v. Harrison*, 12 Mod. 346; *Buller, J., Salte v. Field*, 5 T. R. 215; *Spencer, v. Wilson*, 4 Munf. 130; *Morgan v. Stell*, 5 Binn. 305. — Where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person who deals with him as agent on the faith of it without any notice of the revocation, the act of the agent, within the scope of the authority, will bind the principal. *Beard v. Kirk*, 11 N. H. 397. This necessity for actual notice of revocation, or a general notoriety equivalent to notice, has been held to exist in full force in the case of an authority implied from cohabitation, joined with the previous sanction of acts of agency performed by the person held forth as wife. That the tradesman furnishing the goods in such a case has knowledge that the woman is only a mistress, does not affect his right to notice of separation. *Ryan v. Sams*, 12 Q. B. 460, where *Munro v. De Chemant*, 4 Camp. 215, was commented on.

(j) See last note.

dissolution or change of parties was not properly made known. (*k*)

The death of the principal operates *per se* a revocation of the agency. (*l*) But not if the agency is coupled with an * interest vested in the agent. (*m*) Then it survives, and the agent may do all that is necessary to realize his interest and

(*k*) *Graham v. Hope*, 1 Peake, 154; *Parkin v. Carruthers*, 3 Esp. 248; *Wardwell v. Haight*, 2 Barb. S. C. R. 549.

(*l*) Litt. § 66; *Hunt v. Rousmanier*, 8 Wheat. 201; *Watson v. King*, 4 Camp. 272; *Lepard v. Vernon*, 2 V. & Beam. 51; *Smout v. Ilbery*, 10 M. & W. 1; *Rigs v. Cage*, 2 Humph. Tenn. R. 350. In *Cassiday v. McKenzie*, 4 W. & Serg. 282, it was held, in opposition to the current of authority, that a payment made by an agent, after the death of his principal, he being ignorant thereof, was valid as an act of agency. — *Lunacy of the principal* revokes, but the better opinion (according to Ch. Kent, 2 Comm. 645,) is, that the fact of the existence of lunacy must have been previously established by inquisition before it could control the operation of the power; and see Bell's Comment. on the Law of Scotland, § 413. — In *Davis v. Lane*, 10 New Hamp. 156, it was held, that the authority of an agent, where the agency is revocable, ceases, or is suspended, by the insanity of the principal, or his incapacity to exercise any volition upon the subject-matter of the agency, in consequence of an entire loss of mental power; but that if the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent within the scope of the authority he appears to possess, the principal and those who claim under him, may be precluded from setting up the insanity as a revocation. The court in this case also held, that the principle, that insanity operates as a revocation, cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent. Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, was left undecided. See *Jones v. Noy*, 2 M. & K. 125; *Waters v. Taylor*, 2 Ves. & B. 301; *Huddleston's case*, 2 Ves. Sen. 34, 1 Swanst. 514, *n.*; *Sayer*

v. Bennett, 1 Cox's Cas. 107. — *Bankruptcy* of the principal revokes the authority. *Parker v. Smith*, 16 East, 382; *Minett v. Forrester*, 4 Taunt. 541. Defendant being in the employment of J. in his trade, sold, *bonâ fide*, some goods belonging to J., after J. had committed an act of bankruptcy, of which defendant was ignorant. The sale was more than two months before the commission issued. Defendant acted under a general authority. The assignee brought trover. *Held*, on a plea of not guilty, that defendant, having sold under a general authority only, had been guilty of a conversion. *Pearson v. Graham*, 6 Ad. & El. 899. — *Marriage of feme sole principal* revokes. *White v. Gifford*, 1 Rol. Abr. *Authoritie* E. pl. 4; *Charnley v. Winstanley*, 5 East, 266.

(*m*) *Hunt v. Rousmanier*, 8 Wheat. 201; *Bergen v. Bennett*, 1 Caines's Cas. 1; *Smyth v. Craig*, 3 W. & S. 14; *Cassiday v. McKenzie*, 4 W. & S. 282; *Knapp v. Alford*, 10 Paige, 205. — The important question is what constitutes an authority coupled with an interest; and here there is some diversity in judicial definition. In *Hunt v. Rousmanier*, 8 Wheat. 201, it was held (*Marshall, C. J.*, giving the opinion of the court) that the interest which can protect a power, after the death of the person who creates it, must be an interest in the thing itself on which the power is to be exercised, and not an interest in that which is produced by the exercise of the power. — In *Smart v. Sandars*, 5 C. B. 895, 917, *Wilde, C. J.*, said that "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest: " — that is, irrevocable except by the death of the principal; for the dictum, as the whole case shows, is to be taken in connection with the doctrine, understood still to prevail in Eng-

make it beneficial to himself; nor is such agency revocable at the pleasure of the principal in his lifetime, (*n*) and if the agent dies it passes over to his representatives. (*o*) It is, in such case, an important if not a decisive question, whether the act authorized could be performed by the agent in his own name, or only by him as an agent, and in the name of the principal. In the first case, if an interest were coupled with the agency, the authority would survive the death of the principal, and the agent might perform the act in the same manner after the death as before. In the latter case, as he could no longer use the name of the principal, for the obvious reason that one who is dead *can no longer act*, it would seem that his right must be limited to that of requiring the representatives of the deceased to perform the act necessary for his protection.

* SECTION IX.

HOW THE PRINCIPAL IS AFFECTED BY THE MISCONDUCT OF HIS AGENT.

A principal is liable for the fraud or misconduct of his agent, so far, that, on the one hand, he cannot take any benefit from any misrepresentation fraudulently made by his agent, although the principal was ignorant and innocent of the fraud; (*p*) and on the other hand, if the party dealing with

land, on the authority of Lord *Ellenborough*, in *Watson v. King*, (4 Camp. 272,) that death revokes even a power coupled with an interest. See *ante*, note (*h*.)

A warrant of attorney to confess judgment is not revocable; and though determinable by death, yet, at common law, as a judgment entered up during any term, or the subsequent vacation, related to the first day of such term, a warrant of attorney might be made available after the death of the principal, by entering up judgment within the term and vacation in which the death occurred. Lord *Holt*, *Oades v. Woodward*, 1 Salk. 87; *Fuller v. Jocelyn*, 2 Stra. 882; *Heapy v. Parris*, 6 T. R. 368.

(*n*) *Gausson v. Morton*, 10 B. & Cress. 731; *Walsh v. Whitcomb*, 2 Esp. R.

565; *Allen v. Davis*, 8 Eng. (Ark.) 29.

(*o*) 2 Kent, Comm. 643.

(*p*) *Atty.-Gen. v. Ansted*, 12 M. & W. 520; *Fitzherbert v. Mather*, 1 T. R. 12; *Seaman v. Fonereau*, 2 Stra. 1183; *Fitzsimmons v. Joslin*, 21 Verm. 129. — “I have no doubt that if an agent of a party, say of Mr. *Attwood* in this case, without his knowledge, made a wilfully false representation to the *British Iron Company*, upon which representation they acted, ‘*adhibentes fidem*,’ and on that confidence had formed a contract; — I have no hesitation whatever in saying, that against that contract, equity would relieve just as much as if there was the *scienter* of the principal proved; because it is not a question of criminal responsibility which is here raised by the facts. The agent could not commit the

the agent suffers from such fraud, the principal is bound to make him compensation for the injury so sustained; (*q*) and this although the principal be innocent, (*r*) provided the agent * acted in the matter as his agent, and distinctly within the line of the business intrusted to him. (*s*) And though there be no actual fraud on the part of the agent, yet if he makes a false representation as to matter peculiarly within his own knowledge or that of his principal, and thereby gets a better bargain for his principal, such principal, although innocent, cannot take the benefit of the transaction. (*t*) But the third

principal to any criminal purpose, if the principal did not know it, and had not either given him an authority or adopted his act when he did know it. But as to the civil effect of vitiating the contract made upon that false representation, I have no doubt whatever that it would vacate it just as much, with the ignorance of the principal, as if he were charged with knowing it, and as if the agent had been an agent for this purpose." Lord Brougham in *Attwood v. Small*, 6 C. & Fin. 448.—See also *Taylor v. Green*, 8 C. & Payne, 316; *Olmsted v. Hotailing*, 1 Hill, (N. Y.) 317; *Veazie v. Williams*, 8 How. 134, 3 Story, 611.

(*q*) *Holt, C. J.*, in *Hern v. Nichols*, 1 Salk. 289, and *Ellenborough, C. J.*, in *Crockford v. Winter*, 1 Camp. 124, lay down the broad doctrine that a principal is answerable *civilliter*, though not *criminaliter*, for the fraud of his agent. *Jeffrey v. Bigelow*, 13 Wend. 518, illustrates the general doctrine. There the defendants had been in partnership with one Hunt, for speculation in sheep, they contributing funds, and he time and services. Hunt purchased some sheep diseased with the scab, knowing the fact, and mixed them with a larger number belonging to the partnership. Subsequently Hunt assigned his interest to defendants, who employed S. to sell the sheep. The flock was purchased from S. by the plaintiff, and mixed with the sheep he before owned. The scab broke out among them and destroyed many sheep, of his old stock as well as of those purchased from S.; and considerable expense was incurred in the attempt to arrest the disease. S. was aware of the infected condition of the flock, but no actual knowledge was proved upon the

defendants. *Held*, that plaintiff was entitled to maintain his action, and could recover damages for the loss both of the sheep purchased, and of the other sheep receiving the infection, and all other damages necessarily and naturally flowing from the act of the defendants' agent. *Semble*, the liability of the defendants would have been the same if S. had been ignorant of the state of the flock; the knowledge of Hunt when he bought the diseased sheep being constructively the knowledge of his partners, and his assignment of his interest to the defendants, before the sale to the plaintiff, making no difference as to their responsibility. See also *Johnston v. South Western Railroad Bank*, 2 Strob. Eq. 263; *Mitchell v. Mims*, 8 Tex. 6.

(*r*) *Irving v. Motley*, 7 Bing. 543; *Doc v. Martin*, 4 T. R. 39, 66; *Edwards v. Footner*, 1 Camp. 530. Where an attorney's clerk had simulated the court seal upon a writ, by taking an impression from the seal upon another writ, the writ and all proceedings thereon were set aside, and the attorney although personally blameless was compelled to pay the costs. *Dunkley v. Farris*, 20 E. L. & E. 285.

(*s*) *Peto v. Hague*, 5 Esp. 135; *Huckman v. Fernie*, 3 M. & W. 505.—In *Woodin v. Burford*, 2 Cr. & Mee. 392, *Bayley, B.*, said, "What is said by a servant is not evidence against the master, unless he has some authority given him to make the representation." It is not meant, as the case shows, that there must be an express authority to make that particular representation; but the authority may be implied as incident to a general authority.

(*t*) *Willes v. Glover*, 4 B. & Pul. 14;

party may rescind the contract, and recover back any money he may have paid the principal, by reason of his confidence in such misrepresentation.

SECTION X.

OF NOTICE TO AN AGENT.

A principal is affected by notice to his agent, respecting any matter distinctly within the scope of his agency, when the notice is given before the transaction begins, or before it is so far completed as to render the notice nugatory. (*u*) The notice to the agent may be implied as well as express. *Knowledge* obtained by the agent in the course of *that very transaction* is notice; and it has been said, that knowledge obtained in another transaction, but so short a time previous *that the agent must be presumed to recollect it, is also notice affecting the principal; (*v*) but this is questionable. This matter has been most discussed in cases where, in consequence of the employment of solicitors or counsel in the purchase of real estate, the question has arisen how far the clients are affected with notice of incumbrances, or defects of title, which, by a more or less strong presumption, must be taken to have come to the knowledge of their agents. Two propositions seem to be well settled: the first, that the notice to the solicitor, to bind the client, must be notice in the same transaction in which the client employs him, or at least, dur-

Ashhurst, J., Fitzherbert v. Mather, 1 T. R. 16; *Carpenter v. Amer. Ins. Co.* 1 Story, 57. And it seems the purchaser, without rescinding the contract, may maintain case for deceit against the principal. *Fuller v. Wilson*, 3 Q. B. 58.

(*u*) *Bank of the United States v. Davis*, 2 Hill, (N. Y.) R. 451.—Notice to one of several joint purchasers, whatever be the nature of the estate they take, is not in general notice to the rest, unless he who receives the notice be their agent; and where notice was given to a husband, at the time of taking a conveyance of lands to himself and wife, of a prior unregistered mortgage, it was held not to operate as notice to the wife, so as to give the mortgage a preference in

respect to her title; especially as she had paid the consideration for the conveyance out of her separate estate. *Snyder v. Sponable*, 1 Hill, (N. Y.) 567: S. C. affirmed in error. 7 Hill, 427. It seems a principal is chargeable with notice of what is known to a *sub-agent*, how many degrees soever removed, such sub-agent being appointed by his authority. See *Boyd v. Vanderkemp*, 1 Barb. Ch. 287.—As to the *time* when notice may be given, see *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Lord Windsor*, 2 Atk. 630; *More v. Mayhow*, 1 Ch. Cas. 34; *Wigg v. Wigg*, 1 Atk. 384.

(*v*) *Lord Langdale, M. R., Hargreaves v. Rothwell*, 1 Keen, 159. And see *Mountford v. Scott*, 3 Madd. 34.

ing the time of the solicitor's employment in that transaction; (*w*) the other, that where a purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice of, in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed. (*x*) The first, it is evident, is so far qualified by the second, that where the circumstance of the solicitor's being employed for two parties is in the case, a purchaser, in the language of Sir *J. Wigram*, may be affected with notice of what the solicitor knew as solicitor for the vendor, although as solicitor for the vendor he may have acquired his knowledge before he was retained by the purchaser—whatever the solicitor, during the time of his retainer, knows as solicitor for either party, may possibly in some cases affect both, without *reference to the time when his knowledge was first acquired. Any other qualification of the principle limiting the client's liability to notice acquired in the same transaction, the distinguished judge referred to does not acknowledge. (*xx*) If, however, one assume to act as agent of another, and cause an act to be done for him of which the latter afterwards takes the benefit, he must take it charged with notice of such matters as appear to have been at the time within the knowledge and recollection of the agent. (*y*)

On the other hand, knowledge possessed by a principal

(*w*) *Wigram*, V. C., *Fuller v. Bennett*, 2 Hare, 402, 403. And Lord *Hardwicke* in declaring the same doctrine, in *Worsley v. Scarborough*, 3 Atk. 392, said it would be very mischievous if it were otherwise, for the man of most practice and greatest eminence would then be the most dangerous to employ. And see *Warrick v. Warrick*, 3 Atk. 294. — In *Hood v. Fahnestock*, 8 Watts, 489, it was held, that if one in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards becomes the agent, attorney, or counsel of a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. "The reason is [per *Sergeant*, J. delivering the opinion of the court,] that

no man can be supposed always to carry in his mind the recollection of former occurrences; and moreover, in the case of the attorney or counsel it might be contrary to his duty to reveal the confidential communications of his client. To visit the principal with constructive notice, it is necessary that the knowledge of the agent or attorney should be gained, in the course of the same transaction in which he is employed by his client." *Bracken v. Miller*, 4 W. & Serg. 102, S. P.

(*x*) *Wigram*, V. C., *Fuller v. Bennett*, 2 Hare, 402.

(*xx*) See Judgment, *Fuller v. Bennett*, 2 Hare, 402, where the cases are reviewed and much discussed.

(*y*) *Hovey v. Blanchard*, 13 N. H. 145.

affects a transaction, although the transaction took place through an agent to whom the knowledge was not communicated. (yy) As, if a principal knew of defences to a promissory note available only against a purchaser with knowledge, and this principal bought the note by an agent, who had no knowledge of these defences, they might still be enforced against the principal.

Much question has arisen as to the effect on a corporation, of notice to one who is a member or officer of it. By some it is held that the notice must be made formally to the corporation, (z) and it has been contended on the other hand, that the notice is enough if given to any director, or any member of a board which manages the affairs of the corporation. (a) We consider these views extreme and inaccurate; and should state as the rule of law that a notice to a corporation binds it, only when made to an officer, whether president, director, *trustee, committee-man, or otherwise, whose situation and relation to the corporation imply that he has authority to act for the corporation in the particular matter in regard to which the notice is given. (b)

SECTION XI.

OF SHIPMASTERS.

A master of a ship has, by the policy of the law-merchant,

(yy) In *Willis v. Bank of Eng.* 4 A. & E. 21, 39, the doctrine of notice was thus stated by Lord Denman: "The general rule of law is that notice to the principal is notice to all his agents, *Mayhew v. Eames*; at any rate *if there be reasonable time*, as there was here, *for the principal to communicate that notice to his agents, before the event which raises the question happens*. . . We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive; but the argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions; and, if it were, other inconveniences of a more serious nature would obviously grow out of a different decision." It may be considered worth inquiry whether the clause we have put in

italics is not an essential part of the rule. Certainly, *Mayhew v. Eames*, (3 B. & Cress. 601,) cited by the learned chief justice, is very far from establishing the naked doctrine that notice to the principal is notice *eo instanti* to the agent.

(z) *Louisiana State Bank v. Senecal*, 13 Louis. Rep. 525.

(a) *Bank of U. S. v. Davis*, 2 Hill, (N. Y.) 451; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262.

(b) See *Powles v. Page*, 3 C. B. 16; *Porter v. Bank of Rutland*, 19 Vermont, R. 410, 425; *Fulton Bank v. N. Y. & S. Canal Co.* 4 Paige, 127; *National Bank v. Norton*, 1 Hill (N. Y.) R. 575; *The New Hope, &c. Co. v. The Phoenix Bank*, 3 Comst. 156, 166; *Story on Agency*, §§ 140 a - 140 d.

some authority not usually implied in other cases of general agency. (c) Thus, he may borrow money, if the exigencies and necessities of his position require it, and make his owner liable, and pledge the ship (by bottomry, for the most part) for the repayment. (d) But this authority does not usually extend to cases where the principal can personally act, as in the home port, (e) or in a port where the owner has a specific agent for this purpose, (f) and by parity of reason not in a port so near the owner's home that he may be consulted, without inconvenience and injurious delay. (g) So, too, under such circumstances, he may, without any special authority, sell the property intrusted to him, in a case of extreme necessity, and in the exercise of a sound discretion. Nor need this necessity be *actual*, in order to justify the master and make the sale valid. If the ship was in a peril, which, as estimated from all the facts then within his means of knowledge, was imminent, and made it the most prudent course to sell the ship as she was, without further endeavors *to get her out of her dangerous position, this is enough, and the sale is justified and valid, although the purchasers succeed in saving her, and events prove that this might have been done by the master. For a sudden and entire change of wind or weather, or some other favorable circumstance which no one at the time could have rationally expected, might be the means of her safety; and the powers and duty of the master must not depend on matters which are alike beyond control and foresight. (h)

(c) Whether an action may be maintained against an owner, which is grounded on the exercise of this peculiar and extraordinary authority by one who was not the master on the register, but by appointment of the owner had virtually acted as master, *quære*: see *Stonehouse v. Gent*, 2 Q. B. 431 n.

(d) *Barnard v. Bridgeman*, Moore, 918; *Weston v. Wright*, 7 M. & W. 396; *Arthur v. Barton*, 6 M. & W. 138; *The Gratitude*, 3 Rob. Ad. R. 240; *Stainbank v. Fenning*, 6 E. L. & E. 412; *The Fortitude*, 3 Sumner, R. 228.

(e) *Lister v. Baxter*, Stra. 695; *Pat-*

ton v. The Randolph, Gilp. R. 457; *Ship Lavinia v. Barclay*, 1 Wash. C. C. R. 49; *Lord Abinger*, *Arthur v. Barton*, 6 M. & W. 138.

(f) *Pritchard v. Schooner Lady Horatia*, Bee's Ad. R. 167.

(g) *Johns v. Simons*, 2 Q. B. 425; *Arthur v. Barton*, 6 M. & W. 138; *Mackintosh v. Mitcheson*, 4 Exch. 175; *Beldon v. Campbell*, 20 Law J. Rep. N. S. Exch. 342, 6 Law & Eq. R. 473, where *Robinson v. Lyall*, 7 Price, 592, was questioned.

(h) *The Brig Sarah Ann*, 2 Sumner, 206; *Hunter v. Parker*, 7 M. & W. 322.

SECTION XII.

OF AN ACTION AGAINST AN AGENT TO DETERMINE THE RIGHT OF A PRINCIPAL.

It is a rule of law in respect of all agencies, that where money is paid to one as agent, to which another as principal has color of right, the right of the principal cannot be tried in an action brought by the party paying the money against the agent as for money had and received to the use of such party; but such action should be brought against the principal. (i) For a party who deals with an agent (acting as

(i) *Bamford v. Shuttleworth*, 11 A. & El. 926; *Sadler v. Evans*, 4 Burr. 1984; *Horsfall v. Handley*, 8 Taunt. 136; *Costigan v. Newland*, 12 Barb. 456. Yet if notice not to pay over have been given, then the agent may be sued. Lord *Mansfield*, *Sadler v. Evans*, 4 Burr. 1986; *Edwards v. Hodding*, 5 Taunt. 815; *Hearsey v. Pruyn*, 7 Johns. R. 179; *Elliott v. Swartwout*, 10 Peters, 137; *Bend v. Hoyt*, 13 Peters, 263; *La Farge v. Kneeland*, 7 Cow. 456. See however as to the liability of collectors of the customs, *Cary v. Curtis*, 3 Howard, Sup. Ct. R. 236.— And in some cases it has been held that even without notice, the agent may be held liable for money had and received, if he have not *actually* paid over the money to the principal, or done something equivalent to it: and the mere entering the amount to the credit of the principal, or making a rest, is not equivalent to payment over. *Buller v. Harrison*, Cowper, 565; *Cox v. Prentice*, 3 M. & Sc. 344. But upon these cases Mr. Smith comments as follows: "It will be observed that in neither of these cases could the principal himself ever by possibility have claimed to retain the money for a single instant, had it reached his hands, the payment having been made by the plaintiff under pure mistake of facts, and being void *ab initio*, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S. of Jamaica, who

has received money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Besides which, in *Buller v. Harrison*, had the agent paid the money he received from the underwriter in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud which no agent can be obliged to do. Except in such cases as these, the maxim *respondeat superior* has been applied, and the agent held responsible to no one but his principal." Merc. Law, B. 1, c. 5, sec. 7. In *Snowdon v. Davis*, 1 Taunt. 359, a sheriff had issued a warrant on mesne process, to distrain the goods of A.; the bailiff levied the debt upon the goods of B., and paid it over. Held, that money had and received would lie against the bailiff. *Mansfield, C. J.*, said, "The bailiff pays the money over to the sheriff, and the sheriff to the exchequer, and it is objected, that as it has been paid over, the action for money had and received does not lie against the bailiff; and this is compared to the case of an agent, and the authorities are cited of *Sadler v. Evans*; *Campbell v. Hall*, 1 Cowp. 204; *Buller v. Harrison*, 2 Cowp. 565, and several others. In the case of *Sadler v. Evans*, the money was paid to the agent of Lady Windsor for Lady Windsor's use; in that of *Buller v. Harrison* the money was paid to the broker, expressly for the benefit of the assured.

such, and within the scope of his authority) has, in general, no right to separate him from his principal and hold him liable in his personal capacity. The agent owes an account of his actions to his principal, and that he may be able to render that account, the law, except under special circumstances, refuses to impose upon him a duty to any third party.

We here close all that was proposed to be said of agents as parties to contracts entered into by them in their representative capacity. The relation between agent and principal constitutes itself a distinct contract, and the considerations growing out of it would, in a strictly accurate division, find a place in that part of this work which treats of the Subject-Matter of contracts. But it has been deemed expedient in this instance, as in some others, to sacrifice logical order to the convenience of the reader; and such observations as seem to be required by the contract of Agency, properly so called, are subjoined in the following section.

In *Pond v. Underwood*, the money was paid for the use of the administrator. Can it in this case be said with any propriety, that the money was paid to the bailiff for the purpose of paying it to the sheriff, or to the intent that the sheriff might pay it into the exchequer? The plaintiff pays it under the terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular." But this case has been regarded by high authority as establishing a stronger doctrine than that on which *Sir James Mansfield* appears to have placed it. In *Smith v. Sleaf*, 12 M. & W. 588, *Parke, B.*, referring to *Snowdon v. Davis*, said, "It was there held that a party who had received money wrongfully could not set up as a defence that he had received it for, and paid it over to, a third person." In the same case a dictum of the Court of Exchequer is reported, to the

effect that a payment to A. expressly as the agent of B., for the purpose of redeeming goods wrongfully detained by B., and a receipt by A. expressly for B. would make a case upon which an action against A. for money had and received, could be maintained. And in the case of *Parker v. Bristol and Exeter Railway*, 7 E. L. & E. 528, where the defendants had refused to deliver the plaintiff's goods until he paid an excess over the proper amount due for freight money, it was held that he might maintain an action to recover this excess from the defendants although they received a portion of it only as agents for the Great Western Railway Company; the principle being "that an action for money had and received lies to recover back money which has been obtained through compulsion even although it has been received by an agent who acted for the principal."

SECTION XIII.

THE RIGHTS AND OBLIGATIONS OF PRINCIPAL AND AGENT AS TO EACH OTHER.

An agent with instructions is bound to regard them in every point; nor can he depart from them, without making *himself responsible for the consequences. (*j*) If he have no instructions, or indistinct or partial instructions, his duty will depend upon the intention and understanding of the parties. This may be gathered from the circumstances of the case, and especially, from the general custom and usage in relation to that kind of business. (*k*) But he cannot defend himself by showing a conformity to usage, if he has disobeyed positive instructions. If loss ensue from his disregard to his instructions, he must sustain it; if profit, he cannot retain it, but it belongs to his principal. (*l*)

A principal discharges his agent from responsibility for deviation from his instructions, when he accepts the benefit of his act. (*m*) He may reject the transaction altogether; (*n*) and if he advanced money on goods which his agent

(*j*) *Leverick v. Meigs*, 1 Cow. 645; *Marshall, C. J., Manella v. Barry*, 3 Cranch, 415, 439; *Kingston v. Kincaid*, 1 Wash. C. C. R. 454; *Rundle v. Moore*, 3 Johns. Cas. 36; *Loraine v. Cartwright*, 3 Wash. C. C. R. 151; *Ferguson v. Porter*, 3 Florida, 27.—“And no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of the instructions.” *Washington, J., in Courcier v. Ritter*, 4 Wash. C. C. R. 549, 551: but compare *Forrester v. Boardman*, 1 Story, 43.—If in obedience to the instructions, the agent do an act which is illegal in fact, though not clearly in itself a breach of law, nor known by the agent to be so, he is entitled to be indemnified by the principal for the consequences. *Betts v. Gibbins*, 2 Ad. & El. 57; *Adamson v. Jarvis*, 4 Bing. 66, 72.

(*k*) *Marzetti v. Williams*, 1 B. & Ad. 415; *Sutton v. Tatham*, 10 Ad. & El.

27; *Sykes v. Giles*, 5 M. & W. 645; *Kingston v. Wilson*, 4 Wash. Cir. C. 315.—And if the agent is employed to act in some particular business or trade, he may bind his principal by following the usages of that trade, whether the principal is aware of them or not. *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; there *Parke, B.*, distinguishing the case of *Bartlett v. Pentland*, 10 B. & Cress. 760, said, “That however is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract if it is made in the usual way.”

(*l*) *Catlin v. Bell*, 4 Camp. 184; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Seagar v. Edwards*, 11 Leigh, 213.

(*m*) *Clarke v. Perrier*, 2 Freem. 48; *Prince v. Clark*, 1 B. & C. 186.

(*n*) *Roe v. Prideaux*, 10 East, 158.—If however an agent has done more than

purchased in violation of his authority, he is not bound to return the goods to the agent when he repudiates the sale, but has his lien on them, and may hold them as the property of *the agent. (o) But he must reject the transaction at once, and decisively, as soon as fully acquainted with it. For if he delays doing this, that he may have his chance of making a profit, or if he performs acts of ownership over the property, he accepts it, and confirms the doings of the agent. (p.)

Some conflict appears to exist as to the right of an agent to delegate his authority. On the one hand, the general principle, that *delegatus non potest delegare*, is certain. (q) An agent can do for his principal only that which his principal authorizes; and if the principal appoints an agent to act for him as his representative in any particular business, this agent has not thereby a right to make another person the representative of his principal. The employment and trust are personal; they may rest on some ground of personal preference and confidence, and on the knowledge which the principal has of his agent's ability, and the belief he has of his integrity. But if the agent, merely by virtue of his agency, may substitute one person in his stead, he may

he was authorized to do, the execution, though void as to the excess, may be held good for the rest, at least in equity. But it is necessary in such a case that the boundaries between the excess and the execution of the power should be clearly distinguishable. Sir *Thomas Clarke*, V. C., *Alexander v. Alexander*, 2 Ves. Sen. 644; *Campbell v. Leach*, Ambl. 740; *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 294; *Sugden on Powers*, Ch. 9, sec. 8.—And in some cases it has been held *at law* that an agent transcending his authority in part, binds his principal for the part which was performed in accordance with the authority. *Gordon v. Buchanan*, 5 Yerg. 71; *Johnson v. Blasdale*, 1 Smedes & Marsh, R. 17.—See *Wintle v. Crowther*, 1 C. & Jer. 316.

(o) Lord *Hardwicke*, *Cornwall v. Wilson*, 1 Ves. Sen. 510; Lord *Eldon*, *Kemp v. Pryor*, 7 Ves. 240, 247.

(p) Prince *v. Clark*, 1 B. & Cress. 186; *Cornwall v. Wilson*, 1 Ves. Sen. 509.

(q) *Combe's Case*, 9 Co. R. 75 b, 76 a.—This maxim has frequent application in cases of powers. *Ingram v. Ingram*, 2 Atk. 88; *Alexander v. Alexander*, 2 Ves. Sen. 643; *Hamilton v. Royse*, 2 S. & Lef. 330.—A notice to quit, given by an agent of an agent, is not sufficient without a recognition by the principal. *Doe v. Robinson*, 3 Bing. N. C. 677.—An attachment for non-payment of costs cannot be supported by a demand of the costs by a third person, authorized by the attorney to receive them. *Clark v. Dignum*, 3 M. & W. 319.—In an action on an agreement for the sale of goods, at a valuation to be made by A., the issue was, whether a valuation was made by A. It appeared that the goods were in fact valued by B., A.'s clerk. *Held*, that the defendant was not bound by it, unless it were shown that it was agreed between the parties that B.'s valuation should be taken as A.'s; and that the fact of the defendant's seeing B. valuing, and making no objection until B. told him

another, or any other, and thus compel the principal to be represented by one whom he does not know, or be bound by obligations cast upon him by one whom he does know, and because he knows *him would refuse to employ. But, on the other hand, the principal may, if he chooses, give this very power to his agent. (r) In the common printed forms of letters of attorney, we usually find the phrase, "with power of substitution," and after this a promise to ratify whatever the attorney, "or his substitute," may lawfully do in the premises. That the agent has this power, when it is given to him in this way, cannot be doubted. But, it must be as certain that the principal may confer the same power otherwise; and not only by other language, but without any express words whatever. (s) If a principal constitutes an agent to do a business, which obviously and from its very nature cannot be done by the agent otherwise than through a substitute, or if there exists in relation to that business a known and established usage of substitution, in either case the principal would be held to have expected and have authorized such substitution. (t) So too where an agent without authority appoints a substitute, the principal may, either by words or acts, so confirm and ratify such substitution, as to

the amount, was not evidence of such agreement. *Ess v. Truscott*, 2 M. & W. 385 — A broker cannot delegate his authority. *Henderson v. Barnewall*, 1 Y. & Jer. 387; *Cockran v. Irlam*, 2 M. & Sel. 301, *note*. — Nor can a factor. *Solly v. Rathbone*, 2 M. & Sel. 298; *Catlin v. Bell*, 4 Camp. 183. — A distinction, however, is to be taken between the employment of a servant and the delegation of the authority. An agent, like another person, may act by the hand of a servant as well as by his own hand, in cases where the act is merely physical, or where *mind* enters into it so little that it would be absurd to say that the difference between one mind and another could be of any moment. *Lord Ellenborough*, *Mason v. Joseph*, 1 Smith, 406. See also *Powell v. Tuttle*, 3 Coms. 396.

(r) *Palliser v. Ord*, Bunb. 166. — A power coupled with an interest, given to A. and his assigns, passes with the inte-

rest to A.'s devisee, to the executor of that devisee, and to the assignee of the devisee, &c.; for the word assigns includes both assignees in law and in fact. *How v. Whitefield*, 1 Vent. 338, 339; S. C. as *How v. Whitebanck*, 1 Freeman, 476.

(s) *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Gillis v. Bailey*, 1 Foster (N. H.) 149.

(t) An architect employed by defendants to draw a specification for a building proposed to be erected, himself employed the plaintiff to make out the quantities, which work was to be paid for by the successful competitor for the building contract; the jury found a usage for architects to have their quantities made out by surveyors: — it was held that the plaintiff was entitled to recover compensation from the defendants. *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814. *Ledoux v. Goza*, 4 Louis. Ann. 160.

give to it the same force and effect as if it had been originally authorized. (*u*)

A substitute of an agent who had no authority to appoint him cannot be held as the agent of the original principal, but is only the agent of the agent who employs him, (*v*) and who is accordingly *his* principal; and the person so employed is * bound only to his immediate employer, and must look only to him for compensation. (*vv*) But a substitute appointed by an agent, who has this power of substitution, becomes the agent of the original principal, and may bind him by his acts, and is responsible to him as his agent, and may look to him for compensation.

An agent is bound to great diligence and care for his principal; not the utmost possible, but all that a reasonable man under similar circumstances would take of his own affairs. (*w*) And where the instructions are not specific, or do not cover the whole case, there, as we have already stated, he is to conform to established usage, as that which was expected from him. (*x*) This usage may be generally proved by ordinary means; but in some instances, as in relation to negotiable bills and notes, it is required and defined by the law; and here it must be followed precisely. (*y*) And an agent is bound to

(*u*) *Tindal*, C. J., *Doe v. Robinson*, 3 Bing. N. C. 677, 679; *Mason v. Joseph*, 1 Smith, 406.

(*v*) *Cobb v. Becke*, 6 Q. B. 930; *Robbins v. Fennell*, 11 Q. B. 248.

(*vv*) *Cleaves v. Stockwell*, 33 Maine, 341.

(*w*) Co. Litt. 89, a.; *Chapman v. Walton*, 10 Bing. 57; *Lawler v. Keaquick*, 1 Johns. Cas. 174; *Kingston v. Kincaid*, 1 Wash. C. C. 454.—Less than ordinary diligence is required of one who acts as agent gratuitously; unless indeed he hold himself out as a person exercising one of certain privileged professions or trades, as that of an attorney. *Doorman v. Jenkins*, 4 N. & Mann. 170, 2 Ad. & El. 256; *Dartnall v. Howard*, 4 B. & Cress. 345. See *infra* n. (*z*.)

(*x*) *Ante*, p. 69*, note (*k*); *Wiltshire v. Sims*, 1 Camp. 258.—And the usage if followed (in the case where there are no express instructions,) is a defence to the charge of negligence. *Russell v. Hankey*, 6 T. R. 12.—As to the factor's

duty to insure, see *Smith v. Lascelles*, 2 T. R. 189; *Tickel v. Short*, 2 Ves. Sen. 239.

(*y*) *Crawford v. Louisiana State Bank*, 1 Mart. N. S. 214; *Miranda v. City Bank of New Orleans*, 6 Louis. 740; *Smedes v. Utica Bank*, 20 Johns. 372.—Yet this liability may be limited by the particular understanding of the parties; as for instance where an agent, dealing with negotiable paper, has been accustomed to do business in a certain way different from that which the law would otherwise require, and the principal employing him may from the circumstances be supposed to know this. *Mills v. Bank of U. S.* 11 Wheat. 431; see *Allen v. Merchants' Bank*, 22 Wend. 215; *East Haddam Bank v. Scovil*, 12 Conn. 303.—And an agent intrusted with a negotiable instrument, and failing to fulfil his duty with respect to it, is only liable like other agents to the extent of the loss he has caused, and does not have to assume the responsi-

possess and exert the skill and knowledge necessary for the proper performance of the duties which he undertakes. (z)

* The responsibility of an agent, whether for positive misconduct, or for deviation from instructions, is not measured by the extent of his commission, but by the loss or injury which he may cause to his principal. (a) And, in general, a verdict against a principal for the act of his servant, is the measure of the damages which the former may recover against the latter. (b) And the agent is responsible if the loss could not have happened but for his previous misconduct, although it was not immediately caused by it. (c)

It may be regarded as a prevailing principle of the law, that an agent must not put himself, during his agency, in a

bilities which the law-merchant imposes upon a negligent party to the bill. *Marshall, C. J., Hamilton v. Cunningham*, 2 Brock. 367. And see *Van Wart v. Woolley*, 3 B. & Cress. 439, and *Van Wart v. Smith*, 1 Wend. 219.—An agent, acting with ordinary diligence, is not liable for injuries caused by his mistake in a doubtful matter of law. *Mechanics' Bank v. Merchants' Bank*, 6 Metc. 13.

(z) One who undertakes to act in a professional or other clearly defined capacity, as that of carpenter, blacksmith, or the like, is bound to exercise the skill appropriate to such trade or profession; and this, it seems, although the undertaking be gratuitous. *Dartnall v. Howard*, 4 B. & Cress. 345; *Shiells v. Blackburne*, 1 H. Bl. 161; *Bourne v. Diggles*, 2 Chitt. 311; *Tindal, C. J., Lanphier v. Phipos*, 8 C. & P. 479; *Denew v. Dave-rell*, 3 Camp. 451.—In *Wilson v. Brett*, 11 M. & W. 113, it was held that a person who rides a horse gratuitously at the owner's request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him. *Rolfe, B.*, said: "The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person

more skilled knows that to be dangerous which another not so skilled as he, does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence*—that it was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." But *Parke, B.*, only went so far as to say that "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

(a) *Sivewright v. Richardson*, 19 Law Times Reps. 10; *Hamilton v. Cunningham*, 2 Brock. R. 350; *Arrott v. Brown*, 6 Whart. 9; *Frothingham v. Everton*, 12 N. H. 239; *Allen v. Suydam*, 20 Wend. 321.—Yet the principal may maintain an action against the agent for a breach of the contract between them, and recover *nominal* damages, although there be no actual loss. *Marzetti v. Williams*, 1 B. & Ad. 415; *Frothingham v. Everton*, 12 New Hamp. 239.

(b) *Mainwaring v. Brandon*, 8 Taunt. 202; 2 Moore, 125, S. C.

(c) *Davis v. Garrett*, 6 Bing. 716; *Short v. Skipwith*, 1 Brock. 103; *Mal-lough v. Barber*, 4 Camp. 150; *Park v. Hamond*, 4 Camp. 344; 6 Taunt. 495, S. C.; *Smith v. Lascelles*, 2 T. R. 187; *Bell v. Cunningham*, 3 Peters, 84, 85; *De Tastett v. Crousillat*, 2 Wash. C. C.

position which is adverse to that of his principal. (*d*) For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the *exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all this in his own favor. (*e*) This principle is recognized to some extent at law (*f*); but most cases of this kind come before courts of equity. Thus, an attorney may not take a gift from his client, although there be not the least suspicion of fraud. (*ff*) But the rule is applied not so much to those who act as servants, or instruments for some particular thing, as to persons whose employment is rather a trust than a mere service. Thus, one holding property for another, which it is his duty to sell, cannot himself purchase it; (*g*) or if he be employed to buy, he cannot sell. (*h*) A technical reason given for this is, that the same person cannot both buy and sell. But if employed to sell, where he would not himself convey or transfer the property as agent, because the principal would do this himself, still the agent cannot bind the principal to make the transfer to him or for his benefit, by any contract which he makes as his agent. As agent to sell, it is his duty to get the highest fair price; and this duty is incompatible with his wish to buy; and so, *vice versa*, if he is an agent to purchase. At one time, it was understood to be necessary to show that

R. 132; *Morris v. Summerl*, 2 Wash. C. R. 203.—But the loss must be capable of being ascertained with reasonable certainty. *Webster v. De Tasset*, 7 T. R. 157; *The Amiable Nancy*, 3 Wheaton, 560; *Smith v. Condry*, 1 Howard, 28; *Tide-water Canal Co. v. Archer*, 9 Gill & J. 479.

(*d*) *Lees v. Nuttall*, 2 M. & K. 819; *Lees v. Nuttall*, 1 R. & M. 53; *Dunbar v. Tredennick*, 2 B. & Beatty, 319; *Norris v. Le Neve*, 3 Atk. 38; *Taylor v. Salmon*, 4 M. & Cr. 134; *Huguenin v. Basely*, 14 Ves. 273; *Woodhouse v. Meredith*, 1 Jac. & Walk. 24; *Barker v. Marine Ins. Co.* 2 Mason, 369; *Church v. Marine Ins. Co.* 1 Mason, 344; *Par-kist v. Alexander*, 1 Johns. Ch. 394; *Shepherd v. Percy*, 4 Martin, N. S. 267; *Coles v. Trecothick*, 9 Ves. 234.—An

agent may not dispute the title of his principal, *unless the principal obtained the goods fraudulently*. *Hardman v. Wilcox*, 9 Bing. 382, n. (a.)

(*e*) *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 Camp. 43.

(*f*) See *infra*, note (jj.)

(*ff*) *Lord Erskine, C., Wright v. Proud*, 13 Ves. 138; *Montesquieu v. Sandys*, 18 Ves. 308; see *Ker v. Dugannon*, 1 Dru. & War. 542; *Middleton v. Welles*, 4 Bro. P. C. 245. See also *Cutts v. Salmon*, 12 E. L. & E. 316.

(*g*) *Lowther v. Lowther*, 13 Ves. 103; *Wren v. Kirton*, 8 Ves. 502; *Morse v. Royal*, 12 Ves. 355; *Charter v. Trevelyan*, 11 C. & Fin. 714.

(*h*) *Lees v. Nuttall*, 2 M. & K. 819; *Taylor v. Salmon*, 4 M. & Cr. 139; *Bunker v. Miles*, 30 Maine, 431.

a trustee had taken undue advantage of his position, in order to set aside a purchase by him of that which he was a trustee to sell. (i) But this is not so now. (j) At present, the rule in equity appears to be, that any act by an agent with respect to the subject-matter of the agency injurious to his principal, may be avoided by the principal. If an agent to sell become the purchaser, or if an agent to buy be himself the seller, a court of chancery, upon the timely application of the principal, will *presume* that the transaction was injurious, and will not permit the agent to contradict this presumption; — unless, indeed, he can show that the principal, when furnished with all the knowledge he himself possessed, gave him previous authority to be such buyer or seller, or afterwards assented to such purchase or sale. (jj)

(i) Lord *Loughborough*, *Whichcote v. Lawrence*, 3 Ves. 750.

(j) *Ex parte Bennett*, 10 Ves. 385; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Brothers v. Brothers*, 7 Ire. Eq. 150; *Harrison v. McHenry*, 9 Geo. 164; *Sturdevant v. Pike*, 1 Carter (Ind.) 277; *Mason v. Martin*, 4 Maryl. 124.

(jj) Lord *Eldon*, *Coles v. Trecothick*, 9 Ves. 234, 247; Lord *Erskine*, *Lowther v. Lowther*, 13 Ves. 103; *Ex parte Hughes*, 6 Ves. 617; *Murphy v. O'Shea*, 2 J. & L. 422; *E. I. Comp. v. Henchman*, 1 Ves. Jun. 289; *Ex parte Bennett*, 10 Ves. 385; *Oliver v. Court*, 8 Price, 127; *Fox v. Mackreth*, 2 Bro. Ch. 400; *The York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Molony v. Kernan*, 2 D. & War. 31; *Davoue v. Fanning*, 2 Johns. Ch. 252; *McConnell v. Gibson*, 12 Ill. 128; *Pensonneau v. Bleakley*, 14 Ill. 15; *Dwight v. Blackmar*, 2 Mich. 330; *Clute v. Barron*, *Ibid.* 192; *Allen v. Bryan*, 7 Ire. Eq. 276; *Moore v. Moore*, 1 Selden, 256; *Conger v. Ring*, 11 Barb. 356; *White v. Trotter*, 14 Smedes & Marsh. 30; *Michoud v. Girod*, 4 How. 503; *Green v. Sargeant*, 23 Verm. 466. — Unless the principal object, the transaction stands good; and a third party cannot open it. *Jackson v. Van Dalfsen*, 5 Johns. 43; *Jackson v. Walsh*, 14 Johns. 407; *Williams's Ex'rs v. Marshall*, 4 G. & Johns. 376; *Litchfield v. Cudworth*, 15 Pick. 31; *Pitt v. Petway*, 12 Ire. L. 69. — How far a court of law, at the

instance of the principal, will go in avoiding such sales or purchases by the agent for his own benefit, is not quite clear. Probably in no jurisdiction where chancery powers have existed from the beginning, and where courts of law have not been compelled to act, in order to prevent parties from being without remedy, would it be held that a sale by an agent to himself is avoided at law by the mere dissent of the principal, without proof of fraud, or breach of a positive instruction to make sale to some third party. From the language of the court in *Jackson v. Walsh*, 14 Johns. 414, 415, it may be inferred that if A., as executor, sell land to B., and B. on the same day reconvey to A., the legal title is vested in A., in the absence of actual fraud. And there is a strong intimation in *Williams's Ex'rs v. Marshall*, 4 G. & Johns. 376, 380, that even if it be a chattel interest that is sold, the principal, desiring to set aside the sale merely on the ground that the agent was himself the purchaser, must resort to equity. And so it seems to be held in Massachusetts: *Harrington v. Brown*, 5 Pick. 521, *per cur.*; *Shelton v. Homer*, 5 Metc. 467. — In *Perkins v. Thompson*, 3 N. H. 144, it was decided that a deputy sheriff who on selling goods seized upon an execution, was himself the purchaser, thereby became guilty of a conversion, and was liable in trover; but the amount paid for the goods was allowed to be given in evidence in mitigation of da-

*Among the obvious and certain duties of an agent, is that of keeping a correct account of all money transactions, and rendering the same to the principal with proper frequency, or whenever called on. (*k*) The court has compelled the rendering of such account after twenty years had elapsed. But, in general, after a considerable time has elapsed, and there are no circumstances to repel the presumption of an account rendered, accepted, and settled, the jury are instructed to make that presumption. (*l*) The agent of an agent is generally accountable only to his own principal, and not to *the principal of the party for whom he acts; that is, only his immediate employer can call him to account. (*m*)

If an agent, without necessity, has mixed the property of his principal with his own, in such a way that he cannot render an account precisely discriminating between the two, the whole of what is so undistinguishable is held to belong to the principal; (*n*) for it was the duty of the agent to keep the

mages. At that time, however, the New Hampshire courts possessed no equitable jurisdiction. And see *Lessee of Lazarus v. Bryson*, 3 Binn. 54. — In New Jersey, the court, in order to give relief at law, held that a sale to himself by an executor, administrator, or trustee, intrusted with the sale of real estate, must be considered *absolutely void* by common law. *Den v. Hammel*, 3 Harrison, 74, 81. See *Mackintosh v. Barber*, 1 Bing. 50.

(*k*) *Topham v. Braddick*, 1 Taunt. 572; *Lord Chedworth v. Edwards*, 8 Ves. 49; *White v. Lady Lincoln*, 8 Ves. 363; *Lord Hardwicke v. Vernon*, 14 Ves. 510; *Lady Ormond v. Hutchinson*, 13 Ves. 47; *Lupton v. White*, 15 Ves. 436; *Pearse v. Green*, 1 Jac. & Walk. 135; *Motley v. Motley*, 7 Ire. Eq. 211. See as to the classes of persons whom equity will compel to account, *Terry v. Wachter*, 15 Sim. 448. — It seems that where the agent has made a mistake in the account, he will not be bound by the account as given, although his principal have acted upon the presumption of its correctness in his dealings with third parties — provided there was ground from which the principal might reasonably have inferred the ex-

istence of the error. In the case adjudged, the principal like the agent was a broker, and the mistake in the account was one which a knowledge of the usage of the stock market might have enabled him to detect. *Dails v. Lloyd*, 12 Q. B. 531.

(*l*) *Topham v. Braddick*, 1 Taunt. 571.

(*m*) *Stephens v. Badcock*, 3 B. & Ad. 354, where it was held that money had and received could not be maintained against an attorney's clerk, who, in the absence of his master, and authorized by him, received certain money due to the plaintiff which the attorney had been employed by the plaintiff to collect; although the absence of the attorney (who proved to be in a state of insolvency) continued, and the defendant had not paid over the money to him or his estate. The agent when he received the money had given a receipt signed "for Mr. S. J. [the attorney,] J. B." [the defendant.] See also *Pinto v. Santos*, 5 Taunt. 447; *Myler v. Fitzpatrick*, Madd. & Geld. 360.

(*n*) *Lupton v. White*, 15 Ves. 436; 440; *Chadworth v. Edwards*, 8 Ves. 46; *Wren v. Kirton*, 11 Ves. 377; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108.

property and the accounts separate, and he must bear the responsibility and the consequences of not doing so.

As the principal is entitled to receive from the agent properly intrusted to him, with its natural increase, (o) he may charge the agent with interest for balances in his hands, unless the nature of the transaction, or evidence, direct or circumstantial, shows that the intention of the parties was otherwise. (p) This may be inferred, for instance, where there has been a long accumulation, and the money has lain useless in the agent's hands, and the principal has known this. (q)

(o) *Brown v. Litton*, 1 P. Wms. 141; *Massey v. Davies*, 2 Ves. Jr. 317; *Diplock v. Blackburn*, 3 Camp. 43; *Short v. Skipwith*, 1 Brock. 103.

(p) *Dodge v. Perkins*, 9 Pick. 368, 388. "Upon the principles of the common law, we think it clear that interest is to be allowed, where the law by implication makes it the duty of the party to pay over the money to the owner, without any previous demand on his part." *Putnam, J.* As to receivers, see ——— *v. Jolland*, 8 Ves. 72.

(q) Lord *Ellenborough* seems to have been of opinion in *Rogers v. Boehm*, 2 Esp. 704, that neither in law nor in equity, if money had been remitted to an agent, and he suffered it to remain dead in his hands, could he be made liable for interest; though he should be chargeable with interest if he mixed the money with his own, or made any use of it.

CHAPTER IV.

FACTORS AND BROKERS.

Sec. I. — *Who is a Factor, and who a Broker.*

THE Factor is intrusted with the property, which is the subject-matter of the agency; the Broker is only employed to make a bargain in relation to it. The compensation to both is usually a commission; and when the agent guarantees the payment of the price for which he has sold the goods of his principal, then the commission is larger, as it includes a compensation for this risk. In this case he is said in the books to act under a *del credere commission*. But this phrase is seldom used in this country, nor indeed is the word factor often employed by mercantile men. The business of factors is usually done by commission merchants, who are generally called by that name, and who do or do not charge a guarantee commission as may be agreed upon by the parties. But the charge of a guarantee commission gives the factor no increased authority over the property. (r.)

SECTION II.

OF FACTORS UNDER A COMMISSION.

Whether a factor under a *del credere* commission becomes thereby a principal debtor to his principal, or only a surety, has been somewhat doubted; (s) but it appears to be now settled that he is still only a surety, and that recourse must be had first to the principal debtor, on whose default only the factor is liable. (t) It seems, however, to be still held, that the promise of the factor to guarantee the debt is not within the

(r) *Morriss v. Cleasby*, 4 M & S. 566;
Thompson v. Perkins, 3 Mason, 232,
 and cases cited by *Story*, J.

(s) *Grove v. Dubois*, 1 T. R. 112: *Leverick v. Meigs*, 1 Cowen, 645, 663, 664.
 (t) *Houghton v. Matthews*, 3 B. & P.

statute of frauds, as a promise to pay the debt of another. (*u*) If he takes a note from the purchaser of the goods, this note belongs to his principal. But if he takes depreciated paper he must make it good. (*v*) If money be paid him and he remits it, he does not guarantee its safe arrival, but is bound only to use proper means and proper care. (*w*)

SECTION III.

OF THE DUTIES AND THE RIGHTS OF FACTORS AND BROKERS.

A broker or factor is bound to ordinary care, and is liable for any negligence, error, or default, incompatible with the care and skill properly belonging to the business that he undertakes. (*x*) It is his business to sell; but the power to sell does not necessarily include the power to pledge. This rule was formerly applied with great severity; (*y*) but it seems

485; *Morris v. Cleasby*, 4 M. & S. 566; *Gall v. Comber*, 7 Taunt. 558; *Peele v. Northcote*, 7 Taunt. 478; *Couturier v. Hastie*, 16 E. L. & E. 562; *Bradley v. Richardson*, 23 Verm. 720; *Thompson v. Perkins*, 3 Mason, 232; *Wolff v. Koppel*, 5 Hill, (N. Y.) 458. See *Wolff v. Koppel*, 2 Denio, 368, where conflicting opinions are given on this question by Porter and Hand, Senators.

(*u*) *Swan v. Nesmith*, 7 Pick. 220. *Wolff v. Koppel*, 5 Hill, (N. Y.) 458; *S. C.* 2 Denio, 368; *Couturier v. Hastie*, 16 E. L. & E. 562; *Bradley v. Richardson*, 23 Verm. 720.

(*v*) *Dunnell v. Mason*, 1 Story, 543.

(*w*) *Lucas v. Groning*, 7 Taunt. 164; in *Muhler v. Bohlens*, 2 Wash. C. C. 378, the defendants received consignments from the plaintiff, and engaged to sell them on a *del credere* commission, and to guarantee the debts. They sold to one Walters part of the goods, and when the money for which the goods were sold became due, they took Walters's bill of exchange for the amount, and remitted the same to the plaintiff. They also purchased another bill of one Imbert, which they also remitted to the plaintiff, in part payment for sales of his goods. Walters and Imbert failed, and the bills were protested; and this action was

brought to recover the amount on defendants' guarantee. *Washington, J.*—“The guaranty of the defendants extended no farther than to the sales, and receipts of the money arising from them. As to Imbert's bill, therefore, there is no pretence for charging the defendants with that, as it was a bill purchased by the defendants, from a man in good credit, and it was purchased for the purpose of a remittance, as the defendants had been directed. But the guaranty extends to Walters's bill, which was not purchased with the proceeds of the plaintiff's goods, but was given by a purchaser of those goods instead of money. If the defendants were bound to guarantee the payment of this debt when contracted, the guaranty continues, because a bill which is dishonored is no payment.”

(*x*) *Vere v. Smith*, 1 Vent. 121.

(*y*) The factor cannot pledge the goods of his principal as security for his own debt. *Paterson v. Tash*, 2 Str. 1178. The principal may recover goods pledged by the factor, by tendering to him the sum due to him, without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 604; *M'Combie v. Davies*, 7 East, 5; *Solly v. Rathbone*, 2 M. & S. 298. See also *De Bouchout v. Goldsmid*, 5

to be now the law, aided by some statutes both of England* and of this country, (z) that he may pledge the goods for advances made in good faith for his principal, and perhaps otherwise if distinctly for the use and benefit of the principal, (a) or for advances made to himself to the extent of his lien; (b) or, perhaps generally, if the owner has clothed the factor with all the *indicia* of ownership so as to enable him to mislead others, and the pledgee had no notice or knowledge that he was not owner; (c) and he may pledge negotiable paper intrusted to him by his principal, to a party who has no notice or knowledge of his want of title. (d)

He is bound to obey precisely positive instructions, but not mere wishes or inclinations; (e) and will be justified in departing from precise instructions if an unforeseen emergency arises, and he acts in good faith and for the obvious and certain advantage of his principal. (f)

Factors or Brokers must conform to the usages of the business; and they have the power such usages would give them, and can bind the principal only to a usual obligation. A factor need not advise insurance, still less make insurance; but having possession of the goods, he may insure them for the owner. (g) A factor has discretionary power in regard to the time, mode, and circumstances of a sale;

Ves. 211; *Martini v. Coles*, 1 M. & S. 140; *Fielding v. Kymer*, 2 Br. & Bing. 639; *Queiroz v. Trueman*, 3 B. & C. 342; *Kinder v. Shaw*, 2 Mass. 398; *Odiorne v. Maxcy*, 13 Mass. 178; *Bowie v. Napier*, 1 McCord, 1; *Van Amringe v. Peabody*, 1 Mason, 440; *Whitaker on Lien*, 123, 136; *Rodriguez v. Hefferman*, 5 Johns. Ch. 429. He cannot barter the goods of his principal, but must sell them outright. *Guerreiro v. Peile*, 3 B. & Ald. 616.

(z) See *ante*, p. 51* n. (g), for statutes which regulate the power of the factor to pledge the goods of his principal. For interpretations of these acts see *Stevens v. Wilson*, 6 Hill, (N. Y.) 512; *S. C.* 3 Denio, 472; *Zachrisson v. Ahman*, 2 Sand. Sup. Ct. 68; *Jennings v. Merrill*, 20 Wend. 1; *Navulshaw v. Brownrigg*, 13 E. L. & E. 261.

(a) *Man v. Shiffner*, 2 East, 523; *McCombie v. Davies*, 7 East, 5; *Solly v. Rathbone*, 2 M. & S. 298; *Pultney v.*

Keymer, 3 Esp. 182; *Urquhart v. McIver*, 4 Johns. 103, 116. "A factor may deliver the possession of goods on which he has a *lien* to a third person, with notice of the *lien* and with a declaration that the transfer is to such person as agent of the factor, and for his benefit." *Kent*, C. J.

(b) *Ibid.*

(c) *Boyson v. Coles*, 6 M. & S. 14; *Williams v. Barton*, 3 Bing. 139.

(d) *Collins v. Martin*, 1 B. & P. 648; *Treuttel v. Barandon*, 8 Taunt. 100.

(e) *Brown v. McGran*, 14 Peters, 479; *Ekens v. Marklish*, Ambler, 184; *Lucas v. Groning*, 7 Taunt. 164.

(f) *Judson v. Sturges*, 5 Day, 556; *Drummond v. Wood*, 2 Caines, 310; *Liotard v. Graves*, 3 Caines, 226; *Lawler v. Keaquick*, 1 Johns. Cas. 174; *Forrestier v. Bordman*, 1 Story, 43.

(g) *De Forest v. The Fire Insurance Co.* 1 Hall, 84.

but he must exercise this discretion in good faith ; and if he *hastens a sale improperly, and without good reason, it is void. (*h*)

A factor is a general agent from the nature of his employment ; and if he be known as a general commission merchant or factor, he binds the principal who employs him, although for the first time, by any acts fairly within the scope of his employment, even if they transcend the limits of his instructions ; if the party dealing with him had no knowledge of those limits.

If he sends goods to his principal, contrary to order or to his duty, the principal may refuse to receive them, and may return them, or if the nature of the goods or other circumstances make it obviously for the interest of the factor that they should be sold, the principal may sell them as his agent. (*i*)

If he have no *del credere* commission, he may still be personally liable to his principal ; as where he makes himself liable by neglect or default ; or if he sells the goods of several principals to one purchaser, on credit, taking a note to himself, and getting the same discounted. (*j*) Or if he sells on credit, and when that expires takes a note to himself. (*k*) But if he sells on credit and at the time takes a negotiable note which is not paid, the loss falls on the principal, although the note was payable to the factor. (*l*)

A foreign factor is one who acts for a principal in another country ; a domestic factor acts in the same country with his principal. A foreign factor is, as to third parties, under ordinary circumstances, a principal. And though his principal may sue such third parties, they cannot sue his principal, for

(*h*) *Shaw v. Stone*, 1 Cush. 228, 248. "But it seems, if the sale be hurried in order to enable the factor to realize his advances, and is not made in due course of business, it will be void." . . . The agents "were bound as factors to sell at reasonable and fair prices ; and it would be contrary to their duty, and a fraudulent proceeding on their part to sell the goods at a greatly reduced price, or, in common parlance, to sacrifice them, in order the more hastily to realize the proceeds." *Shaw, C. J.*

(*i*) *Kemp v. Pryor*, 7 Ves. Jr. 237, 240, 247 ; *Cornwall v. Wilson*, 1 Ves. Sen. 509.

(*j*) *Jackson v. Baker*, 1 Wash. C. C. 394 ; S. C. 445 ; *Johnson v. O'Hara*, 5 Leigh, 456. But not necessarily so. *Goodenow v. Tyler*, 7 Mass. 36 ; *Corlies v. Cumming*, 6 Cowen, 181.

(*k*) *Hosmer v. Beebe*, 2 Martin, N. S. 368.

(*l*) *Messier v. Amery*, 1 Yeates, 540 ; *Goodenow v. Tyler*, 7 Mass. 36.

they act with the factor only, and on the factor's credit. But *it seems to be otherwise with the domestic factor. A third party dealing with him may have a claim on his principal, unless it can be shown that credit was given to the factor exclusively. (m) That is, in the case of a foreign factor the presumption of law is, that credit was given to him exclusively; in the case of a domestic factor, that credit is given to his principal. It seems very nearly and perhaps quite settled, that for the purpose of this rule, our States are not foreign countries to each other. (n)

(m) *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574. The following authorities distinguish the foreign and domestic factors: *Gonzales v. Sladen*, Bull. N. P. 130; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Thomson v. Davenport*, 9 B. & C. 87; *Kirkpatrick v. Stainer*, 22 Wend. 244.

(n) In *Thomson v. Davenport*, 9 B. & Cr. 78, a purchaser in Liverpool represented that he bought for persons in Scotland, but did not mention their names. The seller did not inquire who they were, and debited the party purchasing; and it was held that he might afterwards sue the principal for the price. Lord Tenterden, C. J., said, "There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at *Dumfries*; and a question might have been raised for the consideration of the jury, whether, in consequence of their living at *Dumfries*, it may not have been understood among all persons at *Liverpool*, where there are great dealings with *Scotch* houses, that the plaintiffs had given credit to *M'Kune* only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to any process of our courts. But, instead of directing the attention of the Recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that *M'Kune* was buying goods for another,

even though his principal might not be made known to them, they, by afterwards debiting *M'Kune*, had elected him for their debtor. The point made by the defendants' counsel, therefore, was, that if the plaintiffs knew that *M'Kune* was dealing with them as agent, though they did know the name of the principal, they could not turn round on him. The Recorder thought otherwise: he thought that though they did know that *M'Kune* was buying as agent, yet if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed."—In *Kirkpatrick v. Stainer*, 22 Wend. 244, an agent of a foreign mercantile house who induced a merchant here to make a shipment of goods to his principals, to be sold on commission, and engaged that insurance should be effected either here or in Europe on the property shipped, had been held by the Supreme Court not to be personally liable for a breach of the agreement to insure; the action, if maintainable, lay only against the principals. This decision of the Supreme Court was confirmed by the Court of Errors, the Chancellor, (Walworth,) with some other members of the court, dissenting, for reasons which certainly seem to have much weight, although they did not suffice to convince a majority of the Court of Errors. On the precise question before us, the Chancellor says, "Upon a careful examination of the law on this subject, I have arrived at the conclusion that there is a well-settled distinction between the personal liability of an agent, who contracts for the benefit of a domestic principal, and one who con-

The factor and the principal may sometimes have conflicting claims against a purchaser; as the factor for his lien for advances, &c., and the principal for his price. In general it may be said that a purchaser who pays to either, will be protected against the other, if he have no notice or knowledge of any valid claim or right belonging to the other. (o) But, excepting when such rights exist in the factor, the principal

tracts for a principal who is domiciled in a foreign country. I do not think that by our commercial usage it is applicable to the case of a principal who is domiciled in another State of the Union; as the interests of trade do not seem to require it. Besides, it does not appear to have been applied in England to the case of a principal residing in Scotland; although in the case of *Thomson v. Davenport*, before referred to, Lord Tenterden supposed it might have been a proper subject of inquiry for the jury, whether there was not a usage of trade at Liverpool to give the credit to the agent where the principal resided in Scotland. So far as the law is settled on the subject, however, it only applies to a principal domiciled in a foreign country; or, in the language of the common law, 'beyond the seas.'" Senator Verplank gave the only other opinion. He thought the Supreme Court right, and the majority of the Court of Errors agreed with him. But he rests his opinion on the ground, that the English rule, that the factor of a foreign principal is himself liable to the exclusion of the principal, rests entirely upon the custom of trade in England, and is no part of the common law, nor of the law-merchant generally; and is not the law of this country, unless a particular custom could be proved which should give that effect to the contract. And therefore, in the absence of such evidence of custom, the principal is liable as in other cases of contracts by an agent for a principal. Such would seem to be the authority of this case; but we nevertheless hold the rule to be as stated in our text. In *Taintor v. Prendergast*, 3 Hill, (N. Y.) 72, *Cowen, J.*, says, "This suit was brought to recover a sum of money advanced to the defendant, a citizen of this State, in part payment for a quantity of wool which he agreed to deliver to the plaintiff's agent. The contract was made

by the latter without disclosing the name of his principal, who was a merchant residing at Hartford, Connecticut. The agent was a resident of this State. The wool was not delivered as agreed, and the question is, whether an action can be maintained by the principal. It may be admitted, as was urged in the argument, that whether the principal be considered a foreigner or not, his agent omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however I apprehend it would be too strong to say, that when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said, when a clear intent is shown to give an exclusive credit to the agent. I admit that such intent may be inferred from the custom of trade, where the purchaser is known to live in a foreign country. No custom was shown or pretended in the case at bar; and where the parties reside in different States under the same confederation, this has been held essential to exonerate the principal. (*Thomson v. Davenport*, 9 B. & Cr. 78.) It will be seen by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is where the creditor knows there is a foreign principal, but makes his charge in account against the agent. If the seller be kept in ignorance that he is selling to an agent or factor, I am not aware of a case which denies a concurrent remedy." We understand the court to mean, that where the principal purchaser is known, and is known to live in a foreign country, there the existing custom of trade leads to the inference that credit was given exclusively to the agent. And this we think the true rule.

(o) *Drinkwater v. Goodwin*, Cowper, 251; *Atkins v. Amber*, 3 Esp. 493; *Coppin v. Craig*, 7 Taunt. 243; *Hudson v. Granger*, 5 B. & Ald. 27.

has a higher right than he, and may enforce a contract with a third party, for his own benefit.

*A factor may buy and sell, sue and be sued, collect money, receive payments, give receipts, &c. in his own name; but a broker only in the name of his principal. (*p*) A factor has a lien on the property in his hands, for his commission, advances, and expenses; (*q*) but as possession is necessary to give a lien, a broker has no lien. (*r*) In the transaction of business these relations are sometimes confounded, and it is not always easy to distinguish between the factor and the broker. The best test, however, is in the fact of possession; but even with this a party may sometimes be held to be a broker. (*s*) Neither can delegate his authority. (*t*) The broker may certainly be the agent of both parties, and often is so; but it would seem from the nature of his employment, that the factor can be, generally at least, the agent only of the party who employs him,

Neither has a right to his commissions, as a general rule, until the whole service, for which these commissions are to compensate, is performed. (*u*) But where the service is begun, and an important part performed, and the factor or broker is prevented by some irresistible obstacle from completing it, and is himself without fault, there it would seem that he may demand a proportionate compensation. (*v*) Neither can have any valid claim for his commissions or other compensation, if he has not discharged all the duties of the employment which he has undertaken, with proper care and

(*p*) *Baring v. Corrie*, 2 B. & Ald. 143; *Hearshy v. Hichox*, 7 Eng. (Ark.) 125.

(*q*) *Williams v. Littlefield*, 12 Wend. 362; *Holbrook v. Wight*, 24 Wend. 169; The factor has a general lien, to secure all advances and liabilities, upon all goods which come to his hands as factor. *Godin v. London Assur. Co.* 1 Burr. 494; *Hollingworth v. Tooke*, 2 H. Bl. 501; *Cowel v. Simpson*, 16 Ves. 276; *Stevens v. Robins*, 12 Mass. 180; *Bryce v. Brooks*, 26 Wend. 367; *The Frances*, 8 Cranch, 419; *Dixon v. Stansfield*, 11 E. L. & E. 528. And the factor obtains an interest sufficient to support his lien, upon accepting a draft drawn upon the faith of the goods. *Nesmith v. Dyeing*

&c. Co., 1 Curtis 130; *Bank of Rochester v. Jones*, 4 Coms. 497.

(*r*) See *Jordan v. James*, 5 Ham. 99, where the several classes of liens are discussed, and the cases cited. But it is of the very essence of a lien that possession accompanies it.

(*s*) *Pickering v. Busk*, 15 East, 38.

(*t*) *Catlin v. Bell*, 4 Camp. 183; *Solly v. Rathbone*, and *Cockran v. Irlam*, in note (a), 2 M. & S. 298.

(*u*) *Hamond v. Holiday*, 1 C. & P. 384; *Dalton v. Irvin*, 4 C. & P. 289; *Broad v. Thomas*, 7 Bing. 99.

(*v*) *Hamond v. Holiday*, 1 C. & P. 384; *Broad v. Thomas*, 7 Bing. 99; *Read v. Rann*, 10 B. & C. 438.

skill, and entire fidelity. (*w*) And for his injurious default, he not only loses his claim, but the principal has a claim for damages. (*x*) And if he has stipulated to give his whole time to his employer, he will not be permitted to derive any compensation from services rendered elsewhere. (*y*) Neither the factor nor broker can acquire any claim by services which are in themselves illegal or immoral, or against public policy. (*z*)

If a factor, with power to sell, has made advances to his principal, it is not quite certain whether these advances take from the principal the power of revocation. From the cases it would seem, that the weight of authority in this country is against the power of the principal to revoke an authority which has thus become coupled with an interest. But in England it seems to be otherwise. (*a*)

(*w*) *Denew v. Daverell*, 3 Camp. 451; *Hamond v. Holiday*, 1 C. & P. 384; *White v. Chapman*, 1 Stark. 113; *Hurst v. Holding*, 3 Taunt. 32; *Dodge v. Tileston*, 12 Pick. 328. See also *Shaw v. Arden*, 9 Bing. 287; *Hill v. Featherstonhaugh*, 7 Bing. 569. As to his duty to keep accounts, see *White v. Lady Lincoln*, 8 Ves. 363. He must not confound the principal's property with his own. *Lupton v. White*, 15 Ves. 432. He cannot recover his compensation if he has embezzled the principal's funds, although it exceeds the amount embezzled. *Turner v. Robinson*, 6 C. & P. 16, note (*g*.)

(*x*) See note (*a*), p. 74*.

(*y*) *Thompson v. Havelock*, 1 Camp. 527 and cases cited in note; *Massey v. Davies*, 2 Ves. Jr. 317; *Gardner v. M'Cutcheon*, 4 Beavan, 534.

(*z*) *Haines v. Busk*, 5 Taunt. 521; *Josephs v. Pebber*, 3 B. & C. 639; *Wyburd v. Stanton*, 4 Esp. 179; *Buck v. Buck*, 1 Camp. 547; and *Rex v. Shatton*, in note; *Armstrong v. Toler*, 11 Wheat, 258.

(*a*) See note (*h*), p. 58, in which the cases on this question are given in connection with the more general subject of a revocation of an authority coupled with an interest.

CHAPTER V.

SERVANTS.

IN England the relation of master and servant is in many respects regulated by statutory provisions, and upon some points is materially affected by the existing distinction of ranks, and by rules which have come down from periods when this distinction was more marked and more operative than at present. In this country we have nothing of this kind. With us, a contract for service is construed and governed only by the general principles of the law of contracts.

The word servant seems to have in law two meanings. One is that which it has in common use, when it indicates a person hired by another for wages, to work for him as he may direct. We may call such a person a servant in fact; but the word is also used in many cases to indicate a servant by construction of law; it is sometimes applied to any person employed by another, and is scarcely to be discriminated in these instances from the word agent. This looseness in the use of the word is the more to be regretted, because it seems to have given rise to some legal difficulties and questions which might have been avoided. There are important consequences flowing from the relation of master and servant, and it is therefore an important question, where this relation exists, and how far it extends. Thus, if one wishes to build or repair a house, and contracts with another to do this, and the contractor with another, and this other with still a third, for perhaps a part of the work, or the supply of materials, and the servant of the third by his negligence injures some person, has the injured party his right of action against the owner of the land or of the house? Undoubtedly if all employed about the house were his *servants*, but not otherwise. So if an owner of coaches lets one with the horses and the coachman for a definite time or a definite journey, and while the hirer is using the coach the coachman by his negligence injures a person; has the

injured party now an action against the owner? Yes, if the coachman were at the time of the wrongful act *his servant*, and not otherwise. Again, if one employs a person to drive home for him cattle which he has bought, and gives the cattle up to the driver, going elsewhere himself, and the driver, or a person employed by the driver, by his negligence, injures any one, the injured person has, we think, as in the other instances, an action against the original party, if the party who did the wrong were at the time his servant, and not otherwise. The general principle is, that a master is responsible for the tortious acts of his servant, *which were done in his service*. It is certain and obvious that a master is not responsible for all the torts of his servant; for those, for instance, of which the servant is guilty, when they are entirely aside from his service, and have no connection with his duties, or with the command or the wish of his master; as if he should leave his master's house at night and commit a felony. There must, then, be some principle which limits and defines the rule, *respondeat superior*. And we think it may be clearly seen and stated. It is this: the responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant. (aa) It is true that the policy of holding a mas-

(aa) On this ground rests the distinction, now well established, between the *negligence* of the servant, and his *wilful and malicious trespass*:—the act in either case being done in the course of his employ. For the former the master must answer; for the latter he is held not liable, unless the trespass is proved to have been authorized or ratified by him. *McManus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & Ald. 590; *Lions v. Martin*, 8 A. & El. 512; *Goodman v. Kennell*, 1 M. & Payne, 241, 3 C. & P. 167; *Foster v. Essex Bank*, 17 Mass. 479; *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Richmond Turnpike Co.* 2 Comst. 479.—But it seems that where the duty of the master to the party whose property is injured, is not merely that which every man owes to his neighbor, but a peculiar duty arising from a special relation, there that special relation may occasion a liability even for the wilful tort of the servant. As where the relation is one of bailment.

In *Sinclair v. Pearson*, 7 New Hamp. 227, *Parker, J.*, giving the judgment, said, "It is evident, therefore, that the liability of a bailor, for a loss occasioned by the act of a servant, cannot be made to depend upon the question whether the act was wilful or otherwise; or whether the servant, in committing it, was doing, or forbearing, what his master had directed; for if that were the criterion, the bailor would never be liable for the act or neglect of his servant, unless done by his command, either expressed, or in fact to be inferred; but it must depend upon the question whether the degree of care and diligence required about the preservation, safe-keeping, &c., of the thing bailed, has been exercised by master and servant." And *Ellis v. Turner*, 8 T. R. 531, was referred to, where a loss of part of a cargo having occurred in consequence of the misconduct of the master of the vessel, and an action having been brought by the owner of the

ter to a reasonable care and discretion in the choice of a servant may cause a liberal construction of the rule in respect to an injured party, and may therefore be satisfied in some instances with a slight degree of actual control; but of the soundness and general applicability of the principle itself, we do not doubt; nor do we see any greater difficulty in the application of the principle than may always be apprehended from the variety and complexity of the facts to which this and other legal principles may be applied. The master is responsible for what is done by one who is his servant in fact, for the reason that he has such servant under his constant control, and may direct him from time to time as he sees fit; and therefore the acts of the servant are the acts of the master, because the servant is at all times only an instrument; and one is not liable for a person who is a servant only by construction, excepting so far as this essential element of control and direction exists between them. We should therefore

goods against the owners of the vessel, Lord *Kenyon* said, "Though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them: as if he were to commit an assault upon a third person in the course of his voyage."—The rule established in *McManus v. Crickett*, is criticized by *Reeve*, Dom. Rel. 357, and in the case of the *Druid*, 1 Wm. Rob. 405, Dr. *Lushington* commented in forcible terms upon the hardship of the rule, and expressed regret at its adoption.—If a master give general directions which naturally occasion the commission of a tort by the servant executing them, the master is liable, notwithstanding he never commanded that particular act. *Rex v. Nutt*, Fitzg. 47; *Lord Tenterden*, *Rex v. Gutch*, M. & Malk. 437, 438; *Attorney-General v. Siddon*, 1 Tyr. 49; *Gregory v. Piper*, 9 B. & C. 591; *Lord Lonsdale v. Littledale*, 2 H. Bl. 267, 299; *Sly v. Edgley*, 6 Esp. 6. And where the servant is in the employ of the master, and the acts complained of

are done in the course of the employment, the master is responsible although the acts were done in a way directly contrary to his instructions. *Philadelphia and Reading Railroad v. Derby*, 14 How. S. C. 468; *Southwick v. Estes*, 7 Cush. 385.—But in cases where the master is held liable on the ground of an implied authority to the servant to do the particular act for him, if the tort is a trespass on the part of the servant, the master must not be sued in trespass, but case. *Gordon v. Rolt*, 4 Exch. 365; *Sharrod v. London & N. Western Railway Co.* 20 Law J. Rep. (N. S.) Exch. 185, 4 E. L. & E. 401, where a railway train, driven at the rate of forty miles an hour, according to the general directions of the company to the driver, ran over and killed some sheep which had strayed upon the line in consequence of the defective fences of the company. It appeared that if the driver (running the engine at the speed directed) had seen the sheep, he could not have stopped the train in time to prevent the collision. *Held*, that the company were not liable in trespass for the injury; but that the action should have been case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the

say that, in the instances we have before supposed, the owner of the land or the house was not responsible for the tort of the servant of the subcontractor, nor would he have been for the tort of the subcontractor or of the first contractor. They were not *his servants* in any sense whatever; they were to do a job, and when this was done he was to pay the party whom he had promised to pay; and this was all. In accordance with this rule it is settled that where the negligent party exercises a distinct and independent calling his employer is not liable, (b) and if the negligence be committed in the performance of a piece of work undertaken in consequence of a *special contract*, in such case the contractor is solely responsible. (bb) Nor does it make any difference if the contractor be, in matters beside the contract, the servant of the other contracting party. (bc) And the party with whom the contractor engages is not liable, although acts are done by the contractor or his servants amounting to a public nuisance, so long as the act contracted for is not in itself a nuisance. (bd) Yet if the act to be done be itself an unlawful one, or necessarily involves in its performance the commission of a public nuisance, the employer is not discharged from liability on the ground that the party employed was a contractor, because in such case he has complete control, and expressly commands the act to be done. (be) But if the contract-

sheep to be on the railway. It was observed in the judgment, that, notwithstanding the order to the driver to proceed at a great speed, it did not follow as a *necessary* consequence that the engine would infringe on the plaintiff's cattle; and the case was distinguished from *Gregory v. Piper*, 9 B. & C. 591, on this ground.

(b) *Milligan v. Wedge*, 12 Ad. & El. 737; *Martin v. Temperley*, 4 Q. B. 298; *DeForrest v. Wright*, 2 Mich. 368.

(bb) *Allen v. Hayward*, 7 Q. B. 960.

(bc) *Knight v. Fox*, 5 Exch. 72, 1 E. L. & E. 477.

(bd) *Overton v. Freeman*, 3 Carr. & Kir. 49, 8 E. L. & E. 479, S. C.

(be) *Peachey v. Rowland*, 16 E. L. & E. 442; *Ellis v. Sheffield Gas Consumers Co.* 22 E. L. & E. 198.—It is a consequence from the principles stated

in the text, that if a contractor himself employ a servant, he, and not the original employer, is liable for the conduct of that servant. And the general employer does not become liable even if he have a degree of control over the servant, and the power of removal, provided this authority is not so extensive as in effect to render the servant no longer the contractor's servant. Where a company, empowered by act of Parliament to construct a railway, contracted with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence; and the workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath the highway, by allowing a stone to fall

ing party employs *persons to do the work, not on a contract, but on days' wages, he would still retain the power of directing them 'from day to day in their work; and this would render him liable. But we should still hold, that if the work done at day wages were such as to carry with it no implication or probability of actual supervision or control, and none such were proved in fact, the employer would not be liable. For the same reason we should say that the owner and letter of a coach, horses, and coachman, was or was not responsible to one injured by *the negligence of the coachman, as the terms of the hiring and the circumstances of the case led to the conclusion that the coachman was or not at the time of the negligence the servant of the owner or of the hirer of the coach. (*bf*) The owner might doubtless be held responsible

upon him: — *Held*, in an action against the company, upon stat. 9 & 10 Vict. c. 93, by the administratrix of the deceased, that they were not liable; and that the terms of the contract in question did not make any difference. *Reedie v. London & North Western Railway Co.* 4 Exch. 244.

Yet a man is none the less liable for the negligence of his own servants because they were not directly employed by him, but mediately, through the intervention of another, whom he has authorized to appoint servants for him. And *Littledale, J.*, in the able opinion so much cited, instances several cases where the liability exists, although the master has neither the direct appointment nor the superintendence of the servants; as the liability of a ship-owner for the crew selected and governed by the master; of the owner of a farm, who conducts its operations through a bailiff, for the inferior working men hired by the bailiff; and of the owner of a mine for the workmen employed by his steward, and paid by him on behalf of the master. To which may be added the liability of the owner of a chartered ship for the negligence of the crew while under the immediate direction of the charterer. See *Fenton v. Dublin Steam Packet Co.* 8 A. & EL. 835. The following convenient tests for ascertaining in a particular case whether a certain person was the master of the servants in question, are sug-

gested by *Coleridge, J.*, 7 Jur. 152: Had he the power of selecting them? — was he the party to pay them? — were they doing his work? — were they doing that work under his control in the ordinary way? — Where the other elements of liability exist, it is no defence that the master, voluntarily performing part of his work by means of servants, was obliged by law to take those servants from a prescribed class. Whether he would be liable where the law absolutely forbade him to do that part of his business himself, and still allowed him to select out of a class more or less numerous, is perhaps unsettled, but the probability is he would still be held. Where there is this personal prohibition, and also an obligation by law to take a particular individual, and thus no liberty of choice whatever is permitted, it seems the master's liability ceases. See *Martin v. Temperley*, 7 Jur. 150, 4 Q. B. 298; *The Agricola*, 2 Wm. Rob. 10; *The Maria*, 1 Wm. Rob. 95; *Lucy v. Ingram*, 6 M. & W. 302; *Yates v. Brown*, 8 Pick. 23; *Stone v. Codman*, 15 Pick. 297; *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24; *Sproul v. Hemmingway*, 14 Pick. 1; *Ruffin, C. J.*, in *Wiswall v. Brinson*, 10 Ire. L. 563.

(*bf*) A party who is not the general master of a servant may make him his servant in a particular transaction, by specially directing him thereto, or by a subsequent adoption of what he has done; and in this way a special liabil-

to the hirer, if the injured party compelled him to make compensation, and it could be shown that the owner had knowingly employed an insufficient and dangerous servant; for this would be only to hold him responsible for his own negligence. The rule we have given would not require the tort to be committed in the master's presence in order to hold him responsible. It is enough if when the tort was com-

ity may be incurred. And in *Quarman v. Burnett*, 6 M. & W. 508, the owners of the carriage having provided the driver with a livery which he left at their house at the end of each drive, and the injury in question being occasioned by his leaving the horses while so depositing the livery in their house, the court acknowledged that if it had appeared that the coachman went into the house to leave his livery on that occasion under a special order of the owners, or under a general order to do so at all times, without leaving any one at the horses' heads, a liability would have been incurred. In the course of the judgment, Baron *Parke* observed, "It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." See also *Burgess v. Gray*, 1 C. B. 578. — Where question is not made of the fact of service, but simply whether it is a service of *that party* whom it is attempted to charge — there can be no doubt that the servant cannot have, with respect to the same act of service, two unconnected masters. Two persons may be joint masters, and thereby subject to a joint liability; and such joint liability may be converted into a several one by the election of the plaintiff to sue one separately — which the law allows to be done in actions of tort; but "two persons cannot be made separately liable at the election of the party suing, *unless* in cases where they would be jointly liable." *Littledale, J.*,

Laugher v. Pointer, 5 B. & C. 559. This principle serves as a test in that difficult class of cases where the negligent servant seems to be in some respects in the employment of one party, and in some respects in that of another. In such a case, as soon as it is ascertained that, as to the transaction in question, he is the servant of either one, it follows immediately that he cannot be regarded as the servant of the other, who therefore is not liable for his negligence. Hence in the great case of *Laugher v. Pointer*, 5 B. & C. 547, it was held by *Abbott, C. J.*, and *Littledale, J.*, (whose opinion has since been authoritatively approved,) in opposition to the view of *Bayley* and *Holroyd, JJ.*, that where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the owner of the carriage was not liable to be sued for such injury. And the case is not affected though the owners of the carriage asked for that particular servant among many. "If the driver be the servant of the job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference." See also *Quarman v. Burnett*, 6 M. & W. 508; *Stevens v. Armstrong*, 2 Selden, 435.

mitted the wrongdoer was in the service of the master, and was *then* acting as his servant. And this question has been held to be a question of fact for the jury. (c)

There seems to be some extension of the responsibility of the master, when the work, in the doing of which the injurious negligence occurred, related to real estate; on the ground that the owner of such property is bound to be careful how his use of it or acts in relation to it affect third parties or the public; but the limits of this extension are not well settled. If it have any foundation whatever, it must rest upon the maxim *sic utere tuo ut alienum non lædas*, which while it imposes a certain restriction upon the use of all property, may be held perhaps to apply more especially to lands; and whoever permits any thing to be done upon his ground, to the positive damage of another, may be responsible for the nuisance. This duty, however, cannot extend so far as to oblige the owner of land to see to it in all cases that a nuisance is not erected thereon. The measure of his responsibility must be his reasonable power of control; and therefore it should be sufficient for his exculpation, that he never, either expressly or impliedly *sanctioned* the nuisance. But if he let his land with a nuisance upon it, he would, on the same principle, be liable for its *continuance*, as well as for its erection, although he had reserved to himself no right to enter upon the land and abate the nuisance. And so if he let land for a particular use which must result in a nuisance, he should perhaps be liable therefor. (d)

(c) Per Lord Abinger, at *nisi prius*, Brady v. Giles, 1 M. & Rob. 494.

(d) See Rich v. Basterfield, 4 C. B. 783; The King v. Pedley, 1 A. & E. 822, 3 N. & M. 627; Fish v. Dodge, 4 Denio, 311; Carle v. Hall, 2 Metc. 353. And possibly this doctrine may enter into the decision in Burgess v. Gray, above referred to.—It was once believed that the owner of fixed property, as distinguished from the owner of a personal chattel, was liable in a peculiar manner (in addition to the liability noticed in the text) for injuries resulting from the negligent management, by any one sover-

Laugher v. Pointer, 5 B. & C. 560; Judgment, Quarman v. Burnett, 6 M. & W. 510. But the supposed distinction was quite disregarded in Allen v. Hayward, 7 Q. B. 960; and in Reedie v. London and North-Western Railway Co., 4 Exch. 244, it was expressly overruled. There Rolfe, B., giving the judgment, said, "On full consideration, we have come to the conclusion that there is no such distinction, unless perhaps the act complained of is such as to amount to a nuisance. . . . It is not necessary to decide whether in any case the owner of real property, such as land or houses, may be respon-

Of the general principles of the law of contracts applicable to the contract of service, we have already considered some under the head of Agency; and we shall defer the consideration of others, and of the questions which they present, to the fourth Book of this Part, which relates to the subject-matter of contracts, and to the chapter upon the topic of the Hiring of Personal Service.

sible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then, his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, '*Sic utere tuo ut alienum non ledas*,''' Bush v.

Steinman, 1 B. & Pul. 404; Randleson v. Murray, 8 A. & El. 109, and other cases of that class, must be regarded as substantially overruled; and such American decisions as were made before the recent investigations, in deference to those cases, will not, it is presumed, be adhered to. De Forrest v. Wright, 2 Mich. 368. See, however, the Mayor, &c. of New York v. Bailey, 2 Denio, 433; and City of Buffalo v. Holloway, 14 Barb. 101; cases which it seems difficult to reconcile with the current of recent English decisions. See also Lowell v. Boston and Lowell R. R. Co. 23 Pick. 24; Gardner v. Heartt, 2 Barb. S. C. 165; Stone v. Codman, 15 Pick. 297.

CHAPTER VI.

OF ATTORNEYS.

ATTORNEYS are made so by a letter or power of Attorney (e) or they are Attorneys of Record.

It is a general rule, that one acting under the power of attorney, cannot execute for his principal a sealed instrument, unless the power of attorney be sealed. (f) But as oral or written powers are equally parol, one by oral authority may sign the name of his principal without a seal thereto; and so

(e) "Few persons are disabled to be private attorneys to deliver seizin; for monks, infants, femmes covert, persons attainted, outlawed, excommunicated, villeins, aliens, &c., may be attorneys. A feme may be an attorney to deliver seizin to her husband, and the husband to the wife." Co. Litt. 52, a.—An infant cannot execute a power coupled with an interest. *Hearle v. Greenbank*, 3 Atk. 695, 714.

(f) *Harrison v. Jackson*, 7 T. R. 209; *Elliot v. Davis*, 2 B. & P. 338; *Berkeley v. Hardy*, 5 B. & C. 355; *Stetson v. Patten*, 2 Greenl. R. 358.—If a partner seal for himself and copartner, in the presence of the copartner, it is sufficient, though his authority be only by parol. *Ball v. Dunsterville*, 4 T. R. 313.—In *Brutton v. Burton*, 1 Chitty, R. 707, it was held that a warrant of attorney under seal, executed by one person for himself and partner in the absence of the latter, but with his consent, was a sufficient authority for signing judgment against both; on the ground that a warrant of attorney to confess judgment need not be under seal.—And *Hunter v. Parker*, 7 M. & W. 322, contains another application of the same equitable and reasonable principle. Compare *Banorjee v. Hovey*, 5 Mass. R. 11, 24.—An instrument to which the agent of a corporation has affixed his seal, may be evidence of the contract in an action of assumpsit against the corporation; for the seal of the agent of a corporation, unlike that of the agent of a natural person, never can be the seal of his principal. *Randall v. Van Vechten*, 19 Johns. 60; *Damon v. Inhabitants of Granby*, 2 Pick. 345; *Bank of Columbia v. Pat-*

tersons's Admr., 7 Cranch, 299.—There is a class of *Partnership* cases, in which it has been held that any express ratification, though parol, by a partner of a contract under seal entered into for the firm by his copartner, makes the instrument the deed of the firm. *Darst v. Roth*, 4 Wash. C. C. R. 471; *Mackay v. Bloodgood*, 9 Johns. 285.—The dicta of several judges have extended this exception to include an *original* parol authority. See *Skinner v. Dayton*, 19 Johns. 513, where the decision seems to be too broadly stated in the reporter's note. Some *decisions* also go to this extent, as *Gram v. Seton*, 1 Hall, (N. Y.) 262.—In *Cady v. Shepherd*, 11 Pick. 400, the cases are reviewed, and among others *Brutton v. Burton*, 1 Chitty, R. 707, (see *supra*), the decision in which is stated nakedly, without the addition of the reason by which the Court of Queen's Bench appear to have been governed, and which goes to reconcile it with the authorities. And see *Hunter v. Parker*, 7 M. & W. 331, 332, 344; *Price v. Alexander*, 2 Greene, (Iowa,) 427. *Cady v. Shepherd*, however, must be taken to decide the law for Massachusetts to be, that a partner may bind his copartner by a contract under seal, made in the name and for the use of the firm, in the course of the partnership business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. Whether the doctrine of these cases is to be extended to other than partnership cases, is open to doubt: the probability is that it will not. It is worthy of no-

he may be *authorized orally to bind his principal by written contracts, where the statute of frauds requires a writing signed by the parties sought to be charged, as the foundation of an action. (g)

The effect of a written authority in limiting the power of an attorney precisely within what is written, may be illustrated by the execution of a deed by one person for another. If a grantor requests a person in his presence to sign for him his (the grantor's) name to a deed, and the person thus requested writes the name of the grantor without writing his own, or adding any words to indicate that the grantor acted by attorney, this would seem to be nevertheless the signature of the grantor, and the deed would be valid. But if the grantor has given to A. B. a power of attorney in the ordinary form, authorizing him to execute a deed for him as his attorney, and this person writes the name of the grantor in his absence, without saying "by A. B. his attorney," or writing his own name; this would seem to be not a sufficient execution of the deed. Because A. B. had no other power to act for the grantor than that which the letter of attorney gave him; and that did not give him any other power than to act as the grantor's attorney; that is, to sign the deed himself, declaring that the grantor signed it by him. In the first case, evidence is admissible to show the authority under which the signa-

tice, in the absence of clear and consistent adjudication, that *parol ratification*, though frequently confounded in the cases with an *original parol authority*, stands on quite a different footing, and may be defended by reasons which do not apply to the other. It is delivery that completes the deed, and a subsequent parol assent, or contemporaneous parol assent, may amount to delivery, though a *previous* assent, by the nature of things, as well as by common law, never can. The deed must exist before it can be delivered; and it may be delivered at any time *after* it once does exist in a completed form. See Byers v. McClanahan, 6 G. & Johns. 250; Parke, B., Hibblewhite v. McMorine, 6 M. & W. 215, citing Hudson v. Revett, 5 Bing. 368; Blood v. Goodrich, 12 Wend. 525, 9 Wend. 68; Bragg v. Fessenden, 11 Ill. 544. And besides, on

the doctrine of *estoppel*, a principal, by admitting that to be his deed which was executed by his agent, might be held to have disabled himself to say that the agent was not duly authorized. As yet, however, the law must certainly be taken to be, that even a *parol ratification* does not make an instrument under seal, executed by an agent who had not an authority under seal, the deed of the principal. Where, however, a partner makes a mortgage of personal property in the name of the firm and seals it, the seal being unnecessary, the mortgage binds the firm. Milton v. Mosher, 7 Metc. 244; see also ante, page 47, note (ww).

(g) Shaw v. Nudd, 8 Pick. 9; Coles v. Trecothick, 9 Ves. 234; Clinan v. Cooke, 1 Sch. & Lef. 22; McComb v. Wright, 4 Johns. Ch. 659; Graham v. Musson, 5 Bing. N. C. 607.

ture was made; and when this exhibits the grantor as present, and as authorizing the signature made in that way, then *it becomes the signature of the grantor made by another hand than his own. But in executing a deed by attorney, the power being delegated to the attorney is with him, and the deed takes effect from his act; and therefore the instrument which gives the power is to be strictly examined and construed. (*gg*)

(*gg*) This point, upon which there seems to be no express decision, arose in the recent case of *Wood v. Goodridge*, 6 Cushing, 117. This was the case of a mortgage deed and note made under a power of attorney under seal, by simply signing the name of the principal opposite to a seal, in the case of the deed, and in the case of the note, by simply writing the principal's name at the foot. It was not necessary to decide the point, the court being of opinion that the power, though very general in its terms, did not confer authority to mortgage, nor to borrow money and bind the principal by a promissory note. But the question of the manner of execution was much considered, and the court, per *Fletcher, J.*, signified an inclination to hold, that where an attorney signs the name of his principal to an instrument which contains nothing to indicate that it is executed by attorney, and without adding his own signature as such, it is not a valid execution.—A deed was signed in the presence and by the direction of P. G., (and in the presence of an attesting witness,) thus: "P. G. by M. G. G." It was objected that M. G. G., signing in that manner for the principal, should have had a power under seal; but the deed was held valid. *Gardner v. Gardner*, 5 Cush. 483. In delivering the judgment in this case, *Shaw, C. J.*, said, "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act;

and therefore the power is to be strictly examined and construed."—Perhaps it will still be regarded as an open question whether the simple signing of the principal's name, without evidence on the face of the instrument that the execution is by an agent, may not be sufficient. From a passage in *Dixon on Title Deeds*, vol. ii. p. 533, it may be inferred that the author's view is similar to that now taken by the Supreme Court of Massachusetts. On the other hand the books contain numerous intimations that it has not generally been supposed, heretofore, that any other form is necessary to the valid execution of a deed by attorney than is requisite when the principal makes a deed in his proper person. See 1 *Prest. Abstr.* 2d ed. 293, 294; *Smith, Mer. Law*, B. I. c. 5, sec. 4; *Wilks v. Back*, 2 East, 142, 145; *Elliot v. Davis*, 2 B. & P. 338; *Bac. Ab. Leases*, J. sec. 10. It seems the better opinion that, even since the Statute of Frauds, a signing is not essential to a deed. *Aveline v. Whisson*, 4 M. & Gr. 801; *Cherry v. Heming*, 4 Exch. 631; *Shepp. Touch.* by *Preston*, 56, note. If this be so, it may be considered going very far to hold that the addition of the name of the principal, by the hand of an authorized attorney, invalidates an instrument which would have been perfectly good without any signature at all. In some States, indeed, the Statutes of Conveyance modify the common law in this particular, and require signing, as well as the affixing of a seal. With respect to instruments not under seal, the opinion seems equally to have prevailed that an authority to sign for a principal is well executed by the mere subscription of the principal's name. *Chitty on Bills*, 9th ed. 33; *Byles on Bills*, 6th ed. 26.—An auctioneer or auctioneer's clerk performs his implied authority by simply writing the purchaser's name in

An attorney of record, more commonly called an attorney at law, is one who has been duly admitted by competent authority to practise in the courts. Such an attorney need not prove his authority to appear for any party in court, and act for him there, unless his authority be denied, and some evidence be offered tending to show that he has no such authority. (*h*) But a person who is not an attorney at law, and who offers to appear for another in court, by special authority, must prove such authority if requested. (*i*)

An attorney who places his client's money in the hands of his own banker, to his own private account, though he does this *bonâ fide*, and has money of his own in the hands of the same banker, is liable for the loss thereof by the bankruptcy of the banker. (*j*) But it seems that he is not liable if he deposits the money as the property of the owner, and

the memorandum of sale. *Bird v. Boulter*, 4 B. & Ad. 443. This indeed is of no great weight in itself, since that case might be viewed as falling within the class expressly distinguished by the Supreme Court of Massachusetts, namely, where the signature is made in the presence of the principal, and by his immediate direction: yet there is a case of *White v. Proctor*, 4 Taunt. 209, where the objection was expressly taken that the name of the auctioneer ought to appear as well as that of the purchaser. There *Best*, Sergeant, referring to *Emmerson v. Heelis*, 2 Taunt. 38, said that in that case the auctioneer wrote his own name in the heading of the paper, and that the decision was given on that ground. But *Mansfield*, C. J., replied, "In that case there was no argument upon the circumstance that the auctioneer had signed, nor was the case at all decided upon that ground; his saying '*sold by John Wright*,' did not make him agent for the buyer; the only question was, whether his signing the purchaser's name was done by him as agent for the purchaser." The power of one partner to bind the firm by a note or bill has been referred to principles of agency; and it is well established that the signature of the firm name without more is a complete execution. See *Norton v. Seymour*, 3 C. B. 792; *Kirk v. Blurton*, 9 M. & W. 284. — *Watkins v. Vince*, 2 Stark. 368, though meagrely reported,

seems to be a case where Lord Ellenborough entertained no doubt that the signing of the principal's name, by an agent having authority to contract in his behalf, was a sufficient signature. And see *Helmsley v. Loader*, 2 Camp. 450, which is somewhat more explicit.

(*h*) *Osborn v. U. S. Bank*, 9 Wheat. 738, 830; where this rule of evidence was applied in the case of an attorney assuming to act in behalf of a corporation. See also *Jackson v. Stewart*, 6 Johns. 34; *Denton v. Noyes*, 6 Johns. 296; *Henck v. Todhunter*, 7 H. & Johns. 275; *Huston, J., Lynch v. Commonwealth*, 16 S. & R. 369; *Woodbury, J., Eastman v. Coos Bank*, 1 N. Hamp. 23. — The authority from the client need not in general be in writing; yet an oral authority to appear in a cause is not sufficient to enable the attorney to release the interest of a witness. *Murray v. House*, 11 Johns. 464. As to the evidence required to support a claim for services rendered by any attorney to his client, see *Burghart v. Gardner*, 3 Barb. Sup. Ct. 64; *Wilson v. Wilson*, 1 J. & Walk. 457. — *Solicitor* is the legal designation of one who fills the place in a court of equity corresponding to that of an attorney in a court of law. *Maugham*, c. 1, § 1.

(*i*) *Marshall, C. J., Osborn v. U. S. Bank*, 9 Wheat. 829.

(*j*) *Robinson v. Ward*, R. & M. 274, 2 C. & P. 59.

opens a special account specifying whose it is. (*k*) His implied duty to use reasonable skill, care, &c., is the same as that of other persons to whose care and skill any thing is intrusted; which will be spoken of hereafter. (*l*) He is not responsible for mistake in a doubtful point of law, (*m*) or of practice, (*n*) nor for the fault of counsel retained by him. (*o*) He is liable for disclosing privileged communications. (*p*) If discharged by one party he may act for an opposite party, provided he makes no improper use of knowledge obtained by him. (*q*) But it seems that he may not act for an opposite party if discharged by his first client for misconduct. (*r*) An attorney cannot recover his bill against his client, if his client has received no benefit whatever from his services by reason of his want of care and skill. (*s*) But if the client has received any benefit, he must in England pay the bill, and

(*k*) *Abbott, C. J., Robinson v. Ward*, 2 C. & P. 60.

(*l*) *Pitt v. Yalden*, 4 Burr. 2060; *Baile v. Chandless*, 3 Camp. 17, 19; *Shilcock v. Passman*, 7 C. & P. 289; *Godefroy v. Dalton*, 6 Bing. 460; *Meggs v. Binns*, 2 Bing. N. C. 625; *Lynch v. Commonwealth*, 16 S. & Rawle, 368; *Dearborn v. Dearborn*, 15 Mass. 316; *Varnum v. Martin*, 15 Pick. 440; *Wilson v. Coffin*, 2 Cush. 316; *Cooper v. Stevenson*, 12 E. L. & E. 403. And see *ante* p. *73, note.

(*m*) *Kemp v. Burt*, 4 B. & Ad. 424; 1 N. & Man. 262 S. C.; *Elkington v. Holland*, 9 M. & W. 659; *Pitt v. Yalden*, 4 Burr. 2060.

(*n*) *Laidler v. Elliott*, 3 B. & C. 738.

(*o*) *Lowry v. Guilford*, 5 C. & P. 234. — Yet an attorney cannot, by consulting his counsel, shift from himself the responsibility of a matter presumed by the law to lie within his own knowledge. *Tindal, C. J., Godefroy v. Dalton*, 4 M. & P. 149; 6 Bing. 460, S. C.

(*p*) And his liability is not removed by the fact that he was previously retained for the party to whom the disclosures were made, and that his employer knew of that former retainer. *Taylor v. Blacklow*, 3 Bing. N. C. 235.

(*q*) *Bricheno v. Thorp*, 1 Jac. 300. — It is not clear, however, if it be distinctly shown that confidential disclosures have been made to the attorney or solicitor, which if communicated to the other

party must be directly prejudicial to the former client, that a court of equity would not forbid the acceptance of the second retainer, although the attorney was dismissed for no misconduct. *Lord Eldon, C., Bricheno v. Thorp*, 1 Jac. 303, 304; *Cholmondeley v. Clinton*, 19 Ves. 261, 275. In the latter case *Lord Eldon* said, "My opinion is that he [the attorney] ought not, if he knows any thing that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him."

— In *Johnson v. Marriott*, 4 Tyr. 78, where the court refused to restrain an attorney, who (without his misconduct) had been dismissed from the employment of the plaintiffs, from acting for the defendant, the judges rested their decision on the ground that there was no affidavit by the plaintiffs that the attorney, while in their employment, had obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant.

(*r*) *Lord Eldon, Cholmondeley v. Clinton*, 19 Ves. 261; *Gurney, B., Johnson v. Marriott*, 4 Tyr. 78.

(*s*) *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Bracey v. Carter*, 12 Ad. & El. 373; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Hopping v. Quin*, 12 Wend. 517; See *Runyan v. Nichols*, 11 Johns. 547.

may then have an action for damages. (*t*) It has been there held however that a jury may discriminate between the several *items* in an account and reject those for work entirely useless; (*tt*) and it may be doubted whether in America the client might not reduce the attorney's claim by showing the little value of the benefit received, as in actions for other services.

* An attorney is in general liable personally on an agreement made by him in his own name, although only professionally concerned in the matter. (*u*)

There are many English statutes relating to the powers, duties, and responsibilities of attorneys, which have no force in this country. Most of our courts have rules of practice bearing somewhat on this subject. (*v*)

(*t*) *Templer v. McLachlan*, 2 B. & P., (N. R.) 136.

(*tt*) *Shaw v. Arden*, 9 Bing. 289.

(*u*) *Hall v. Ashurt*, 1 C. & Mee. 714; *Iveson v. Conington*, 1 B. & Cress. 160; *Burrell v. Jones*, 3 B. & Ald. 47; *Scrace v. Whittington*, 2 B. & Cress. 11; *Watson v. Murrel*, 1 C. & P. 307.—In New Hampshire, it is held that where a plaintiff resides within that State, and employs an attorney in his behalf to commence an action for him, such attorney is authorized by the employment to place the name of the plaintiff upon the writ as indorser, and to bind him as such; and in such case, if the indorsement be thus: "A., plaintiff, by his attorney B," the plaintiff is regarded as the indorser and the attorney is not personally bound; but if the plaintiff reside out of the State, the attorney

having no authority to bind the plaintiff, is himself personally bound by such indorsement, and the writ accordingly is properly and sufficiently indorsed. *Pettingill v. McGregor*, 12 N. H. 179; *Woods v. Blodgett*, 15 N. H. 569.

(*v*) The nature and scope of the authority of attorneys at law, in this country are considered in *Holker v. Parker*, 7 Cranch, 436; *Erwin v. Blake*, 8 Pet. 18; *Union Bank of Georgetown v. Geary*, 5 Pet. 99; *United States v. Curry*, 6 How. 106; *United States v. Yates*, 6 How. 605; *Smith's Adm'r v. Lamberts*, 7 Grattan, 138; *Lewis v. Gamage*, 1 Pick. 347; *Jenney v. Lesdernier*, 20 Maine, 183; *Jewitt v. Wadleigh*, 32 Maine, 110; *Slackhouse v. O'Hara*, 14 Penn. 88; *Walker v. Scott*, 8 Eng. (Ark.) 644.

CHAPTER VII.

TRUSTEES.

Sect. I.—*The Origin of Trusts.*

It can hardly be denied that Trusts, in the English law, had a fraudulent origin. It was sought, by the intervention of a trustee, to evade the feudal law of tenures, and the prohibitions of the statutes of Mortmain, and to place property where a creditor could not reach it. The practice became common; and as such trustee was not accountable at common law, the Chancellor, in the reign of Richard II., applied the writ of subpœna to call him before the Court of Chancery, where he might be compelled to do what equity and justice required. "A trust," said Sir Robert Atkins, (*w*) "had for its parents fraud and fear, and for its nurse a court of conscience." The obvious utility of trusts has made them very common: but almost the whole jurisdiction over trustees has always remained in the Courts of Equity. (*x*) So far as they come under the supervision and control of the common law, trustees are treated in most respects as agents, and most of the principles and rules of law in relation to them have been anticipated and stated under that head.

(*w*) Attorney-General *v.* Sands, Har-
dres, 405; *arguendo*, "A trust is altogether the same that an use was before 27 Hen. 8, and they have the same parents, fraud and fear; and the same nurse, a court of conscience. By statute law, an use, trust, or confidence, are all one and the same thing. What an use is, vide Pl. Com. 352, and 1 Rep. in Chudleigh's case; and they are collateral to the land; a *cestui que trust* has neither *jus ad rem* nor *in re*."

(*x*) Co. Litt. 272, b; Chudleigh's Case, 1 Coke, 121. "So that, he who hath an use hath not *jus*, neque *in re*, neque

ad rem, but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in chancery. If the feoffees would not perform the order of the chancery, then their persons for the breach of the confidence were to be imprisoned till they did perform it." — Foorde *v.* Hoskins, 2 Buls. 337. Per Coke, C. J., "If *cestui que use* desires the feoffees to make the estate over, and they so to do refuse, for this refusal an action upon the case lieth not, because for this he hath his proper remedy by a subpœna in the chancery."

SECTION II.

CLASSIFICATION OF TRUSTS.

Trusts are *simple* when property is vested in one person *upon trust* for another, without any particular directions or provisions; and then the nature and operation of the trust are determined by legal construction. They are *special*, where the purposes of the trust, and the manner in which they are to be accomplished are especially pointed out and prescribed; and then these express provisions must be the rule and measure of the trustee's rights and duties.

They may be merely *ministerial*, as where one receives money only to pay the debt of the giver, or an estate is vested in him merely that he may convey it to another. Or they may be *discretionary*, where much is left to the prudence and judgment of the trustee. But in all cases, the trustee, by accepting the trust, engages that he possesses, and that he will exert that degree of knowledge, intelligence and care, reasonably requisite for the proper discharge of the duties which he undertakes to perform.

A trust, *with a power annexed*, is distinguished from a *mixture of trust and power*. (*y*) In the former case, as where lands are vested in trust, with a power in the trustees to make leases of a certain kind, or length, the trustee may or may not exercise this power, and will not be compelled to do so, unless his neglect to exercise it be fraudulent and wrongful. But in the latter case, as where lands or funds are vested in trust for certain persons, to be "distributed among them according to the best judgment of the trustee," here the distribution is of the essence of the trust, and must be made; although in the manner of distribution, the courts will not interfere, unless to prevent fraud or other wrong.

Trustees are also *private* or *public*. The former hold property for the benefit of an individual (the *cestui que trust*) or

(*y*) Gower v. Mainwaring, 2 Ves. Sen. 89; Cole v. Wade, 16 Ves. Jr. 43.

more than one, but who are distinctly pointed out, personally, or by other sufficient description. Public trustees are those *who hold for the benefit of the whole public, or for a certain large part of the public, as a town or a parish; and they are usually treated as official persons, with official rights and responsibilities.

SECTION III.

PRIVATE TRUSTEES.

A private trustee is, as we have seen, one to whom property, either real or personal, has been given to be held in trust for the benefit of others; and the most common instances are trustees of property for the benefit of children, or other devisees or legatees, or for married women, or for the payment of the debts of an insolvent, or for the management and winding up of some business and the like.

The legal estate is in the trustee, and the equitable estate is in the *cestui que trust*; but as the trustee *holds the estate*, although only with the power and for the purpose of managing it, he is bound personally by the contracts that he makes as trustee, although designating himself as such; and nothing will discharge him but an express provision, showing clearly that both parties agreed to act upon the responsibility of the funds alone, or of some other responsibility, exclusive of that of the trustee; or some other circumstance clearly indicating another party who is bound by the contract, and upon whose credit it is made. The mere use by the promisor of the name of Trustee, or of any other name of office or employment, will not discharge him. Some one must be bound by the contract, and if he does not bind some other, he binds himself, (z), and the official

(z) *Thomas v. Bishop*, Cases Temp. Hardwicke, 9, 2 Str. 955. In this case a cashier was held liable on a bill accepted by him generally, though it was drawn on account of the company. *Childs v. Monins*, 2 Bro. & Bing. 460. A promissory note, by which the mak-

ers, as executors, jointly and severally promise to pay on demand with interest, renders them personally liable.—*Eaton v. Bell*, 5 B. & Ald. 34. Commissioners of a private inclosure act, are personally liable on drafts drawn on bankers, requesting them to pay the sums therein

name is then regarded only as describing and designating him.

*A trustee is held not only to careful management of the trust property, so that it shall not be wasted or diminished, but he is bound to secure its reasonable productiveness and increase. If it lie idle in his hands, without cause, he will be charged interest. (a) In some instances he is charged compound interest; but there is some discrepancy in the cases in which the question of compounding interest occurs. On the whole, we think the rule may be stated thus: Interest will be compounded, or computed with annual rests, where the trustee is guilty of gross delinquency, or mingles the trust property with his own for his own benefit, or otherwise so uses the trust funds as to justify the belief that he has actually earned interest upon the interest; and the reason for charging compound interest is much stronger, when the trustee refuses to exhibit the accounts, which would show, precisely, what loss or advantage he has derived from the trust funds. (b) But he will not be charged

mentioned on account of the public drainage, and to place the same to their account, as commissioners. — *Rew v. Pettet*, 1 A. & E. 196, 3 N. & M. 456. The makers of a note who sign it "as church-wardens and overseers," are personally liable, although the loan was for the use of the parish. — *Ex parte Buckley*, 14 M. & W. 469. It was held in this case that there was no separate right of action against "R. M.," a partner who signed a promissory note for himself and his copartner thus, "For J. C., R. M., J. P., and T. S.," "R. M."

(a) *Green v. Winter*, 1 Johns. Ch. 26; *Manning v. Manning*, 1 Johns. Ch. 527; *Schieffelin v. Stewart*, 1 Johns. Ch. 620.

(b) He will be charged with compound interest if he is grossly delinquent in the investment of the money, or employs it in trade, refusing to account for the profits. *Jones v. Foxall*, 13 E. L. & E. 140; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Evertson v. Tappen*, 5 Johns. Ch. 497; *Luken's Appeal*, 7 W. & S. 48; *Boynnton v. Dyer*, 18 Pick. 1; *Turney v. Williams*, 7 Yerg. 172; *Wright v. Wright*, 2

McCord, Ch. 200; *Bryant v. Craig*, 12 Ala. 354; *Karr's Adm'r v. Karr*, 6 Dana, 3; *Rowan v. Kirkpatrick*, 14 Ill. 1. See also *Raphael v. Boehm*, 11 Ves. 92; *S. C.* 13 Ves. 407, 590; *Ashburnham v. Thompson*, 13 Ves. 402; *Tebbs v. Carpenter*, 1 Mad. 299. — But mere neglect to invest the money or an improper investment, without gross delinquency, (*Knott v. Cottee*, 13 E. L. & E. 304; *Robinson v. Robinson*, 9 E. L. & E. 69; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *McCall's case*, 1 Ash. 357; *English v. Harvey*, 2 Rawle, 305; *Harland's case*, 5 Rawle, 323; *Findlay v. Smith*, 7 S. & R. 264; *Dietterich v. Heft*, 5 Barr, 87,) or merely mingling the trust funds with his own, is not sufficient to charge him with compound interest. *Clarkson v. De Peyster*, 1 Hopkins, Ch. 424; 2 Wend. 77, S. C. nom. *De Peyster v. Clarkson*; *Stafford in re* 11 Barb. 353; *Ker v. Snead*, Circuit Court of Virginia, (Oct. 1847); *Scarburgh, J.*, 11 Law Reporter, 217. In the case of *Fay v. Howe*, 1 Pick. 527, and *Robbins v. Hayward*, cited in a note to this case, where large sums of money had come into the hands of a guardian

even with simple interest until a reasonable time for investment has elapsed; and this has * been held, in some cases, six months, a year, or even two years. (c)

A trustee must not himself purchase the property which it is his duty as trustee to sell; nor sell the property which, as trustee, he purchases. This rule applies, in its whole extent, to all agents, and the reasons, limitations, and authorities for it, were presented in treating of that subject.

SECTION IV.

PUBLIC TRUSTEES.

There is an important difference between these trustees and private trustees, in respect to their personal responsibility for their contracts. Where one acts distinctly for the public, and in an official or *quasi* official capacity, although he engages that certain things should be done, he is nevertheless not liable on this engagement, unless there be something in the contract, or some admissible evidence respecting it, which

of infants, there being rents of real estate and income from public stocks periodically received, and no account had been settled for many years, it was ordered that an account should be settled with a rest for every year, and the balance thus struck be carried forward, to be again on interest, whenever the sum should be so large that a trustee acting faithfully and discreetly would have put it into a productive state. And 500 dollars was the sum which the court thought should subject the guardian to this charge. But for cases in which it appears to be doubted whether compound interest should be charged to a trustee, see *Estate of McCall*, 1 Ashm. 357; *English v. Harvey*, 2 Rawle, 305; *Harland's case*, 5 Rawle, 323; *Findlay v. Smith*, 7 S. & R. 264; *Ackerman v. Emott*, 4 Barb. 626. And see *Dietterich v. Heft*, 5 Barr, 87.

(c) In *Karr v. Karr*, 6 Dana, 3, two years were allowed for periodical rests,

at the end of which periods the interest should be made principal. In *Duncomb v. Duncomb*, 1 Johns. Ch. 508, six months after receipt of the moneys was thought a reasonable time, after which interest should be charged. In *Merrick's estate*, 1 Ashm. 304, six months was allowed. In *De Peyster v. Clarkson*, 2 Wend. 77, six months was allowed. In *Fox v. Wilcocks*, 1 Binn. 194, the administrator was held chargeable with interest after twelve months had elapsed from the death of the intestate. In *Boynton v. Dyer*, 18 Pick. 8, one year was considered the proper period. In *Schieffelin v. Stewart*, 1 Johns. Ch. R. 620, the plaintiff was administrator, and was allowed from the 8th Sept., 1803, when administration was granted, to the 6th July, 1805, when the last debt of any magnitude was paid to the estate; then interest began, and the account was computed afterwards with annual rests.

shows that the parties understood and intended the promisor to make his promise personally, and to be bound himself, instead of the State, or in addition to the State, for the due performance of the promise. (d)

* But trustees and other officers are sometimes held personally upon their contracts, as for payment of wages, materials supplied, &c., where they have charge of public works, and have funds which they may use for these purposes, and especially where the nature of the transaction shows that the party dealing with them may well have supposed that he was dealing with them on their own account, or that they intended, although acting for the public, to be responsible for the materials they bought or the labor they hired. (e) Such trustees know the state of the means in their hands, and how far they may rely upon a public provision of funds, and may contract accordingly, while those

(d) *Macbeath v. Haldimand*, 1 T. R. 172. This was an action on promises against the defendant, (who was Governor of Quebec,) for work and labor, &c. *Buller, J.*, said, "It is true that he (the defendant) gave the orders to *Sinclair*, and that every thing which the plaintiff did was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defendant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable." *Unwin v. Wolseley*, 1 T. R. 674. *Ashhurst, J.*, said, "It would be extremely dangerous to hold that governors and commanders in chief should make themselves personally liable by contracts which they enter into on the part of the government. It would be detrimental to the king's service, for no private person would accept of any command on such terms. The case of *Macbeath v. Haldimand* seems to govern the present. It was there determined that a commander was not answerable for contracts entered into by him on behalf of government. And whether the contract be by parol or by deed, it makes no difference as to the

construction to be put on it. That indeed was a stronger case than the present; because there it was left open to evidence, from whence it was to be inferred that the contract was made by the defendant as the agent of the government, but here it appears in express terms that the defendant entered into this contract on the behalf of government." See also *Hodgson v. Dexter*, 1 Cranch, 345; *Tucker v. Justices*, 13 Ire. L. 434.

(e) *Horsley v. Bell and others*, Ambler, 769. An act of parliament was passed to make a certain brook navigable. The defendants, with many other persons, were named commissioners to put the act in execution. Certain tolls were to be paid by vessels which should navigate the brook, and the commissioners were empowered to borrow money on these tolls. The commissioners employed the plaintiff to do different parts of the works, and such of the commissioners as were present at the several meetings, made orders relative thereto. Every one of them was present at some of the meetings, but no one was present at all the meetings. The fund proving deficient, it was held that all the acting commissioners were personally liable to the plaintiff. The Lord Chancellor and the judges agreed in opinion. "The commissioners had power to borrow

who deal with them cannot know this at all, or certainly not so well. (*f*)

The true principle which runs through all of these cases, and applies alike to private and public trustees, is this. To whom did the promisee give credit, and to whom did the *promisor understand him to give credit? If the promisee gave credit to the promisor, and was justified in so understanding the case, and the promisor as a rational person knew or should have known that the promisee trusted to him personally, and he did not guard the promisee from so trusting him, then he cannot turn him afterwards over to those whom he represents, because he must abide his responsibility. On the other hand, if the promisor supposed the promisee to trust only to those for whose benefit he acted, or rather to the funds and means possessed by him as trustee, and if he had a right to suppose so, and the promisee did not demand and receive the assurance of his personal liability, then no such liability exists, and he is bound only to act faithfully as a trustee in the discharge of his promise.

An agent who exceeds his authority and fails to bind his principal, becomes liable himself. On this familiar principle public trustees or officers, as town or parish officers, who enter into contracts in their official capacity, and on behalf of the corporations which they represent, if they so deviate from or exceed their authority as not to bind these corporations, are themselves liable. (*g*) But whether on the

money, and ought to take care to be provided. That the workmen who engaged to do the work could not know the state of the fund, nor was it their business to inquire; they gave credit to the commissioners." *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101, and notes.

(*f*) *Higgins v. Livingstone*, 4 Dow, 341, 355. Lord *Eldon*, in this case, said, "As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that when persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable. But this also, I think,

rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others, who do not know, act as if representing that they had a fund applicable to the object, and are then personally bound to provide funds to pay the contractors."

(*g*) *Sprott v. Powell*, 3 Bing. 478; *Leigh v. Taylor*, 7 B. & C. 491; *Heudebourck v. Langton*, 3 C. & P. 571; *Kirby v. Bannister*, 5 B. & Ad. 1069; *S. C.*, 3 N. & M. 119; *Burton v. Griffiths*, 11 M. & W. 817; *Bay v. Cook*, 2 N. Jer. 343. — *Uthwatt v. Elkins*, 13 M. & W. 772. Church-wardens and over-

contract, or in case, must depend on the character and circumstances of the transaction. (*gg*)

seers of a parish having taken a lease of land in their official capacity, which they were not authorized by the statute 59 Geo. 3, c. 12, to hold in the nature of a corporation, it was held to be a personal undertaking of their own, on which they were individually responsible for the payment of rent. — Anon. 12

Mod. 559. "If an overseer of the poor contract with tradesmen upon account of the poor, and upon his own credit, as soon as he receives so much of the poor's money, it becomes his own debt." *Holt, C. J.*

(*gg*) See *ante*, p. 57, note (*f*.)

CHAPTER VIII.

OF EXECUTORS AND ADMINISTRATORS.

THEY act as the personal representatives of the deceased, having in their hands his means, for the purpose of discharging his liabilities or executing his contracts, and of carrying into effect his will, if he have left one; and in general, they are liable only so far as these means, or assets in their hands, are applicable to such purpose. But they may become personally liable; and a clause in the statute of frauds, hereafter to be spoken of, refers to this subject. In England it is regarded as the peculiar province of a court of equity to administer justice in cases of legacies. (h) The law

(h) *Deeks v. Strutt*, 5 T. R. 690, and see *Jones v. Tanner*, 7 B. & Cress. 542. But it seems *Deeks v. Strutt* is to be understood as only deciding that an action for a legacy cannot be maintained upon an assent of the executor merely implied from his possession of sufficient assets; leaving it open to say that an action may lie upon an express promise by him in consideration of assets, or upon an express admission by him that he has money in his hands for the payment of such legacy. *Barber v. Fox*, 2 Wms. Saund. 137, c. n. (a,) citing *Atkins v. Hill*, Cowp. 284, and *Gorton v. Dyson*, 1 B. & B. 219. It has been held that where an account of the residuary estate of a testator has been made out by the executors, and signed by the parties interested, under which account all of them have been paid except one, such one may recover his proportion, with interest, in assumpsit against the executors. *Gregory v. Harman*, 3 C. & P. 205. Upon the assent of the executor to a bequest of a specific chattel, whether personal or real, the interest in it vests in the legatee, and he may recover it by an action at law. *Doe v. Guy*, 3 East, 120. And see *Paramour v. Yardly*, Plowd. 539. Whether an executor has assented to a bequest is a question of fact for the jury, and not a matter of law to be determined by the

court. *Mason v. Farnell*, 12 M. & W. 674. — Lord Holt is reported to have said, *Ewer v. Jones*, 2 Salk. 415, that a devisee may maintain an action at common law against a tenant, for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party by consequence shall have an action at law to recover it. In *Braithwaite v. Skinner*, 5 M. & W. 313, this dictum was much discussed, and the learned Barons were of opinion that it was to be taken with a material qualification, which is thus stated by *Parke, B.*: “The statute of wills enables a party to dispose by will of the property which he might have disposed of during his lifetime at his free will and pleasure. I think the meaning of Lord *Holt* is this — that if a person gives an interest which could be enforced by an action at law, the statute would give an action for it. Thus, if a person devised by will a right of common, the devisee would have a right of action for it; so if he devised a rent which was not a freehold rent, (which could not be the subject of an action at law,) an action would lie for it. So if he devised a right of way, it could be enforced by action; or if he left a term, the right to it might be enforced by ejectment. So if the testator clearly meant to impose a duty upon another person, obliging him

and practice on this subject vary somewhat in different States of this country.

It is said that the promise of an executor to pay a debt, "whenever sufficient effects are received from the estate of the deceased," must be construed to mean sufficient effects received in the ordinary course of administration, according to law. (*i*) If an executor or administrator receives as such a promissory note or bill of the deceased, and indorses the same, he is liable upon it personally. (*j*) If he makes a note or bill, signing it "as executor," he is personally liable, unless he expressly limits his promise to pay, by the words, "out of the assets of my testator," or "if the assets be sufficient," or in some equivalent way; (*k*) but a note or bill so qualified would not be negotiable, because on condition. If an executor

to pay a legacy, an action of debt would lie for it against the person on whom the duty of paying the money was imposed: as if the testator left an estate in fee to A., directing him to pay a sum of money to B.; I am not prepared to say that an action of debt might not lie, after A. had accepted the estate, founded upon the duty created by the testator of paying that sum. But it is going too far to say that the statute would give a right of action for those things which are merely equitable interests; as, for example, if a testator had created a trust in favor of a person, it would be absurd to say that person could enforce the trust by an action at law." In this case the testator devised lands in fee, after the determination of certain life estates, to A., B., and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to, and to be equally divided among the children of his niece: A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the land to mortgages for 500 years. It was held that an action of debt could not be maintained against the termors for a share of 200*l.* so bequeathed; on the ground that admitting Lord *Holt's* dictum to be correct, that where the testator merely intended to create a duty from one person to another, the law would give a remedy—in this case no duty was imposed upon the defendants towards the plaintiff,

which could be enforced by an action of debt. *Seemle*, no action at law could be maintained, but the proper remedy was in equity. And see on this point *Beecker v. Beecker*, 7 Johns. 99; *Van Orden v. Van Orden*, 10 Johns. 30—In Connecticut and New Hampshire, it has been held that an action at law will lie against an executor upon a promise implied from the possession of assets. *Knapp v. Hanford*, 6 Conn. 170; *Pickering v. Pickering*, 6 N. H. 120. But it is believed that in jurisdictions where courts of chancery have existed, the doctrine of the English cases has been followed. See *Kent v. Somervell*, 7 G. & Johns. 265; *Sutton v. Crain*, 10 G. & Johns. 458.—An action at law by a legatee for a legacy on the executor's promise, must be brought against the executor in his personal, not in his representative, capacity. *Kayser v. Disher*, 9 Leigh, 357.

(*i*) *Bowerbank v. Monteiro*, 4 Taunt. 844.

(*j*) *Buller, J., King v. Thom*, 1 T. R. 489; *Curtis's Ex'x v. Bank of Somerset*, 7 H. & Johns. 25.

(*k*) *Childs v. Monins*, 2 B. & B. 460; *King v. Thom*, 1 T. R. 489; *Forster v. Fuller*, 8 Mass. 58, where the principle was applied to the case of a guardian.—As to covenants by executors or administrators, made professedly in their capacity as such, see *Sumner v. Williams*, 8 Mass. 162; *Thayer v. Wendell*, 1 Gall. 37.

or administrator submits a disputed question to arbitration, in general terms, and without an express limitation of his liability, and the arbitrators award that he shall pay a certain sum, he is liable to pay it whether he has assets or not. (*l*) But if the award be merely that a certain sum is due from the estate of the deceased, without saying that the executor or administrator is to pay it, he is not precluded from denying that he has assets. (*m*)

When there is a contract with an executor or administrator, by virtue of which money has become due, and the money if recovered will be assets in his hands, he may, in general, sue for it in his representative capacity. (*n*) And so he may be sued as executor for money paid for his use in that capacity. (*o*)

With respect to covenants relating to the freehold, the rule of law is that for the breach of a covenant *collateral or in gross*, whether such breach occur before or after the death of the covenantee, the personal representative must sue and not the heir; (*p*) for the breach of a covenant *which runs with the land*, the heir must sue if the breach occur *after* the covenantee's death, the personal representative if it occur *before*. (*q*) The doctrine of a continuing breach, for which the heir or assignee may recover if the ultimate and substantial damage is suffered by him, was established in England by the case of *Kingdon v. Nottle*, (*r*) but it has not been adopt-

(*l*) *Riddell v. Sutton*, 5 Bing. 200.

(*m*) *Pearson v. Henry*, 5 T. R. 6.

(*n*) *Cowell v. Watts*, 6 East, 405; *King v. Thom*, 1 T. R. 487; *Marshall v. Broadhurst*, 1 Tyr. 348, 1 Cr. & Jer. 403; *Heath v. Chilton*, 12 M. & W. 632; *Kane v. Paul*, 14 Pet. 33.

(*o*) *Ashby v. Ashby*, 7 B. & Cress. 444.—But he is only liable *personally* in an action for money *lent* to him as executor, or *had and received* by him as executor. *Rose v. Bowler*, 1 H. Black. 108; *Powell v. Graham*, 7 Taunt. 586; *Jennings v. Newman*, 4 T. R. 347; and see observations of the judges in *Ashby v. Ashby*, 7 B. & Cress. 444; *Miles v. Durnford*, 13 E. L. & E. 120.

(*p*) *Lord Abinger, C. B.*, *Raymond v. Fitch*, 2 Cr. M. & R. 588, 599, 5 Tyr. 985; *Lucy v. Levington*, 2 Lev. 26, 1 Ventris, 175; *Bacon's Abr. Executors and Administrators*, N.

(*q*) *Com. Dig. Covenant*, B. 1, *Administration*, B. 13; *Morley v. Polhill*, 2 Ventris, 56, 3 Salk. 109; *Smith v. Simons*, *Comberbach*, 64.

(*r*) 1 M. & Sel. 355; 4 M. & Sel. 53, (with which *King v. Jones*, 5 Taunt. 418, *accords*.) Along with the authority of this case seems to fall also the doctrine on which it was founded, and of which so much is made in the books, (see *Williams on Executors*, 1st Ed. 519; 1 *Lomax on Executors*, 292,) that an action can in no case be maintained in the name of the executor, unless an injury to the personal estate appears. In England, the Court of Exchequer have gone as far as they can without quite overthrowing *Kingdon v. Nottle*. See the opinion of *Lord Abinger* in *Raymond v. Fitch*, 2 C. M. & R. 596, 600, and the still later case of *Ricketts v. Weaver*, 12 M. & W. 718, where *Parke*,

ed in this country. (*s*) In general, every right *ex contractu*, which the deceased possessed at the time of his death, passes to his executor or administrator; (*t*) and so strong is this rule, that it prevails against special words of limitation in the contract itself. (*u*) But contracts may be extinguished and absolutely determined by the death of the party with whom they are made. (*v*) If money be payable by a bond to such person as the obligee may appoint by will, and the testator makes no appointment by his will, the debt dies, as the executor is not considered his appointee for that purpose. (*w*) Nor could an administrator, where there was no will, claim the money.

The law raises no implied promise to the personal representative, in respect of a promissory note held by the deceased. (*x*)

B., said, "The question therefore is reduced to this, whether an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage. On that point *Raymond v. Fitch*, in which all the cases were considered, is an authority directly in point, and ought not to be shaken. The result of that case is, that unless it be a covenant in which the *heir alone* can sue (according to *Kingdon v. Nottle* and *King v. Jones*) for a breach of the covenant in the lifetime of the lessor, the executor can sue, unless it be a mere personal contract, in which the rule applies that *actio personalis moritur cum personâ*. The breach of covenant is the damage; if the executor be not the proper person to sue, the action cannot be brought by any one." In this country, where the courts are free from the shackles which the authority of *Kingdon v. Nottle* and kindred cases imposes, it is reasonable to believe that the later doctrine (which is also the older doctrine,) as to actions by executors, will be carried to its full extent. See *Clark v. Swift*, 3 Metc. 390.

(*s*) *Greenby v. Wilcocks*, 2 Johns. 1; *Mitchell v. Warner*, 5 Conn. R. 497; *Beddoc's Executor v. Wadsworth*, 21 Wend. 120; *Clark v. Swift*, 3 Metc. 390; *Hacker v. Storer*, 8 Greenl. 228, 232; 4 Kent, Comm. 472.—The case of *Kingdon v. Nottle* has, however, been substantially followed in Ohio and Indiana.

Foot v. Burnet, 10 Ohio R. 317; *Martin v. Baker*, 5 Blackford, 232.

(*t*) *Comyns's Digest, Administration*, B. 13; *Bacon's Abridgment, Executors and Administrators*, N.; *Morley v. Polhill*, 2 Ventris, 56, 3 Salk. 109; *Smith v. Simonds*, *Comberbach*, 64; *Lucy v. Levington*, 1 Ventris, 176, 2 Lev. 26; *Raymond v. Fitch*, 2 Cr. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718; *Carr v. Roberts*, 5 B. & Ad. 84, per *Parke, J.*

(*u*) *Devon v. Pawlett*, 11 Vin. Abr. 133, pl. 27. Somewhat analogous to this is the point stated in *Leonard Lovies' case*, 10 Co. R. 87, b, that a chattel interest in land cannot be entailed.

(*v*) For example, the right to recover for the breach of a promise to marry does not pass to the executor. *Chamberlain v. Williamson*, 2 M. & Sel. 408; *Stebbins v. Palmer*, 1 Pick. 71. And so in other cases where the injury is personal, though accompanying a breach of contract. *Parke, B.*, *Beckham v. Drake*, 8 M. & W. 854; *Lord Ellenborough, C. J.*, *Chamberlain v. Williamson*, 2 M. & Sel. 415, 416. But see *Knights v. Quarles*, 2 B. & B. 104.

(*w*) *Pease v. Mead*, Hob. 9. And the reason given is that the payee in that case is evidently to take for his own use, for the word pay "carryeth property with it;" whereas the executor, when he recovers as assignee in law of the testator, takes for the use of the testator.

(*x*) Therefore the executor in bring-

Where the contract with the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract. (*y*) But where an executory contract is of a strictly personal nature—as, for example, with an author for a specified work, the death of the writer before his book is completed, absolutely determines the contract, unless what remains to be done—as for example, the preparing of an Index, or Table of Contents, &c., can certainly be done as well and to the same purpose by another. (*z*)

If executors or administrators pay away money of the deceased by mistake, or enter into contracts for carrying on his business for the benefit of his personal estate, and to wind up his affairs, they may sue either in their individual or their representative capacities; (*a*) but they should sue in the latter capacity, in order to avoid a set-off against them of their individual debts. (*b*) The title of an administrator does not exist until the grant of administration, and then reverts back to the death of the deceased; but only in order to protect the estate, and not for any other purpose. (*c*) And if an agent sells goods of the deceased, after his death, and in ignorance of his decease, the administrator may adopt the contract and sue upon it. (*d*)

ing an action upon such note, must declare upon the promise to the testator; unless an express promise to the executor can be shown. *Timmis v. Platt*, 2 M. & W. 720.

(*y*) *Marshall v. Broadhurst*, 1 Tyr. 348, 1 Crompt. & Jer. 403. See *Werner v. Humphreys*, 3 Scott, N. R. 226.—*E converso*, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets. *Wentworth v. Cock*, 10 Ad. & El. 42; *Siboni v. Kirkman*, 1 M. & W. 418, 423.—Where several persons jointly contract for a chattel, to be made or procured for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor, that his executors shall pay

his proportion of the price of the article to be furnished. *Prior v. Hembrow*, 8 M. & W. 873, 889.

(*z*) Lord *Lyndhurst*, C. B., and *Bayley*, B., *Marshall v. Broadhurst*, 1 Tyr. 349. See *Siboni v. Kirkman*, 1 M. & W. 423.

(*a*) *Clark v. Hougham*, 2 B. & Cress. 149; *Aspinall v. Wake*, 10 Bing. 51; *Webster v. Spencer*, 3 B. & Ald. 360; *Ord v. Fenwick*, 3 East, 104; *Merritt v. Seaman*, 2 Selden, 168.

(*b*) Per *Bayley*, *Holroyd*, and *Best*, JJ., *Clark v. Hougham*, 2 B. & Cress. 155, 156, 157.

(*c*) *Morgan v. Thomas*, 18 E. L. & E. 526; *Foster v. Bates*, 12 M. & W. 22; *Lawrence v. Wright*, 23 Pick. 128; *Rattoon v. Overacker*, 8 Johns. 126; *Winchester v. Union Bank*, 2 G. & Johns. 79, 80; *Welchman v. Sturgis*, 13 Q. B. 552; *Bell v. Speight*, 11 Hump. 451.

(*d*) *Foster v. Bates*, 12 M. & W. 226.

On the death of one of several executors, either before or after probate, the entire right of representation survives to the *others. (e) But if an administrator dies, or a sole executor dies intestate, no interest and no right of representation is transmitted to his personal representative. (f)

An executor *de son tort* is liable not only to an action by the rightful executor or administrator, but may be sued by a creditor of the deceased. (g) And it is held in England that an executor *de son tort* of a rightful executor is liable in the same manner as a rightful executor of the original testator, for his debts. (gg) But the rightful executor or administrator cannot be prejudiced by an act or contract of an executor *de son tort*. (h) And it would seem, that if an executor *de son tort* be afterwards made administrator, he is not bound by a contract made by himself as executor before the grant of administration. (i)

(e) *Flanders v. Clark*, 3 Atk. 509. So, in the case of the death of one of two administrators, the administration survives to the other. *Hudson v. Hudson*, Cas. Temp. Talb. 127.—That joint executors are one person in law, *Shaw v. Berry*, 35 Maine, 279. But see *Smith v. Whiting*, 9 Mass. 334.

(f) Com. Dig. Administrator, B. 6; *Tingrey v. Brown*, 1 Bos. & Pul. 310.

(g) *Curtis v. Vernon*, 3 T. R. 587.

(gg) *Meyrick v. Anderson*, 14 Q. B. 719.

(h) *Buckley v. Barber*, 15 Jur. 63, (Exch.) 1 Law & Eq. 506; *Mountford v. Gibson*, 4 East, 441; *Dickenson v. Naule*, 1 Nev. & Man. 721; where A. having proved a will, in which she supposed herself to be appointed executrix, employed the plaintiff, an auctioneer, to sell the goods of the testator; and they were sold to the defendant, who, as an

inducement to the plaintiff to let him remove the goods without payment, expressly promised to pay the plaintiff as soon as the bill was made out. Probate was afterwards granted to B., the real executrix, who gave notice to the defendant to pay the price to her. Held, that the plaintiff could not maintain an action against the defendant for the price.—But where the act of the executor *de son tort* was done in the due course of administration, and is one which the rightful executor would have been compellable to do, such act shall stand good. *Graysbrook v. Fox*, 1 Plowd. 282; *Thompson v. Harding*, 20 E. L. & E. 145.

(i) *Doe v. Glenn*, 1 Ad. & El. 49; 3 Nev. & Man. 837, S. C.; *Wilson v. Hudson*, 4 Harring. 169. But see *contra Walworth, C., Vroom v. Van Horne*, 10 Paige, 558; *Walker v. May*, 2 Hill, Ch. (S. C.) 23.

CHAPTER IX.

GUARDIANS.

Sect. I.—*Of the kinds of Guardians.*

GUARDIANSHIP at common law has fallen into comparative disuse in this country, although many of the principles which determined the rights and duties of that relation are adopted, with various qualifications, in the guardianships by testamentary appointment of the father, or by the appointment of courts of probate or chancery, which prevail with us. We have also by statute provisions, guardians of the insane, and of spendthrifts. All of these rest upon the general principle, that it is the duty of society to provide adequate care and protection for the person and property of those who are wholly unable to take care of themselves.

So far as relates to contracts to which guardians are parties, we can do little more than refer to the statutes of the several States, in which the obligations and duties of guardians, their powers, and the manner in which their powers may be exercised, are set forth, usually with much minuteness and precision.

One principle, however, should be stated; which is, that guardians of all descriptions are treated by courts as trustees; and, in almost all cases, they are required to give security for the faithful discharge of their duty, unless the guardian be appointed by will, and the testator has exercised the power given him by statute, of requiring that the guardian shall not be called upon to give bonds. But even in this case, such testamentary provision is wholly personal; and if the individual dies, refuses the appointment, or resigns it, or is removed from it, and a substitute is appointed by court, this substitute must give bonds.

SECTION II.

OF THE DUTY AND POWER OF A GUARDIAN.

The guardian is held in this country to have only a naked authority, not coupled with an interest. (*j*) His possession of the property of his ward is not such as gives him a personal interest, being only for the purpose of agency. But, for the benefit of his ward, he has a very general power over it. He manages and disposes of the personal property at his own discretion, (*k*) although it is safer for him to obtain the authority of the court for any important measure; he may lease the real estate, if appointed by will or by the court, but the guardian by nature cannot; (*l*) he cannot however sell it without leave of the proper court. Nor should he, in general, convert the personal estate into real, without such leave. (*m*)

(*j*) *Granby v. Amherst*, 7 Mass. 1, 6.

(*k*) *Field v. Schieffelin*, 7 Johns. Ch. 154. "I apprehend that no doubt can be entertained as to the competency of the guardian's power over the disposition of the personal estate, including the choses in action, as between him and the *bonâ fide* purchaser. The guardian in socage of the real estate may lease it in his own name, and dispose of it during the guardianship, (and the chancery guardian has equal authority,) though he cannot convey it absolutely without the special authority of this court, because the nature of the trust does not require it." *Kent*, C. This case decides that the purchaser of the ward's personal estate is not responsible for the faithful application of the purchase-money by the guardian, unless he knew or had sufficient information at the time that the guardian contemplated a breach of trust, and intended to misapply the money; or was in fact by the very transaction applying it to his own private purpose.—*Ellis v. Essex Merri-mack Bridge*, 2 Pick. 243. The guardian of a *non compos mentis* can sell her personal estate at his discretion, and her real estate with license from the court. "It is true the guardian ought not to sell personal estate, unless the proceeds are wanted for the due execution of his

trust, or unless he can by the sale produce some advantage to the estate, but having the power without obtaining any special license or authority, a title under him acquired *bonâ fide* by the purchaser will be good, for he cannot know whether the power has been executed with discretion or not." *Parker*, C. J. — *Dorsey v. Gilbert*, 11 Gill & Johns. 87. The court of chancery may authorize a sale of the ward's real estate.—Also in *re Salisbury*, 3 Johns. Ch. 347; *Hedges v. Riker*, 5 Johns. Ch. 163; *Mills v. Dennis*, 3 Johns. Ch. 367. "The court may change the estate of infants from real into personal, and from personal into real, whenever it deems such a proceeding most beneficial to the infant. The proper inquiry in such cases will be, whether a sale of the whole, or only of a part, and what part of the premises will be most beneficial." *Kent*, C.

(*l*) *May v. Calder*, 2 Mass. 56. A lease of an infant's land by his father as natural guardian, is void.

(*m*) The cases cited (3 Johns. Ch. 348, 370; 5 Johns. Ch. 163,) affirm the power of a court to order the minor's real estate to be converted into personal, or his personal into real. but do not expressly deny the guardian's authority to do the latter. See *supra*, note (*k*.)

And where a court of equity authorizes a conversion of real estate into personal, or *vice versa*, it will, if justice requires it, provide that the acquired property retains the character and legal incidents of the original fund. (*n*)

As trustee, a guardian is held to a strictly honest discharge of his duty, and cannot act in relation to the subject of his trust for his own personal benefit, in any contract whatever. And if a benefit arises thereby, as in the settlement of a debt due from the ward, this benefit belongs wholly to the ward. (*o*) He must not only neither make nor suffer any waste of the inheritance, but is held very strictly to a careful management of all personal property. (*p*) He is responsible not only for any misuse of the ward's money or stock, but for letting it lie idle; and if he does so without sufficient cause, he must allow the ward interest or compound interest in his account. This subject is more fully presented in treating of the responsibility of Trustees. (*q*)

And to secure the proper execution of his trust, he is not only liable to an action by the ward, after the guardianship terminates, but during its pendency the ward may call him to account by his next friend, or by a guardian *ad litem*. And

(*n*) *Foster v. Hilliard*, 1 Story, 88; *Wheldale v. Partridge*, 5 Ves. Jr. 396; *Craig v. Leslie*, 3 Wheat. 563, 577; *Peter v. Beverly*, 10 Peters, 532; *Hawley v. James*, 5 Paige, 318-489; *Kane v. Gott*, 24 Wend. 660; *Reading v. Blackwell*, 1 Baldwin, 166. The above cases illustrate the general principles of equitable conversion, without being applied exclusively to conversions by a guardian with license from court.

(*o*) *Green v. Winter*, 1 Johns. Ch. 26; *Church v. The Marine Insurance Co.*, 1 Mason, 345; *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Davoue v. Fanning*, 2 Johns. Ch. 252; *White v. Parker*, 8 Barb. 48; *Ringgold v. Ringgold*, 1 H. & G. 11; *Rogers v. Rogers*, 1 Hopkins, Ch. 515; *Lovell v. Briggs*, 2 N. H. 218; *Sparhawk v. Allen*, 1 Foster 9.—The guardian is not entitled to compensation for services rendered before his appointment. *Clowes v. Van Antwerp*, 4 Barb. S. C. 416.

(*p*) *Dietterich v. Heft*, 5 Barr, 87. If he lends money on the mere personal

security of one whose circumstances are equivocal, he is responsible for the money lent.—*Stem's Appeal*, 5 Whart. 472. "Whenever the guardian has the fund and disposes of it to another, he must do it with strict and proper caution, and is seldom safe unless he takes security." *Sergeant, J. Konigmacher v. Kimmel*, 1 Penn. 207; *Pim v. Downing*, 11 S. & R. 66; *Smith v. Smith*, 4 Johns. Ch. 281.—But he is bound in general only to the exercise of common prudence and skill. *Johnson's Appeal*, 12 S. & R. 317; *Konigmacher v. Kimmel*, 1 Penn. 207. He is liable for any negligence. *Glover v. Glover*, 1 McMullan, Eq. 153.—*Stanley's Appeal*, 8 Barr, 431. Although expressly authorized to invest the ward's money in bank stock, he is personally liable if he invests it in his own name.—*Worrell's Appeal*, 9 Barr, 508. He was held liable for the ward's money invested in the stock of a navigation company, in good credit at the time, and paying large dividends for a long time afterwards.

(*q*) See *ante*, p. 103,* note (b.)

the courts have gone so far as to set aside transactions which took place soon after the ward came of age, and which were beneficial only to the former guardian, on the presumption that undue influence was used, and on the ground of public utility and policy. (*r*)

A guardian cannot, by his own contract, bind the person or estate of his ward; (*s*) but if he promise on a sufficient consideration to pay the debt of his ward, he is personally bound by his promise, although he expressly promises as guardian. (*t*) And it is a sufficient consideration if such promise discharge the debt of the ward. And a guardian who thus discharges the debt of his ward may lawfully indemnify himself out of the ward's estate, or if he be discharged from his guardianship, he may have an action against the ward for money paid for his use. (*u*) An action will not lie against a guardian on a contract made by the ward, but must be brought against the ward, and may be defended by the guardian. (*v*)

(*r*) *Archer v. Hudson*, 7 Beavan, 551;
Gale v. Wells, 12 Barb. 84.

(*s*) *Thacher v. Dinsmore*, 5 Mass. 300;
Jones v. Brewer, 1 Pick. 314.

(*t*) *Forster v. Fuller*, 6 Mass. 58.

(*u*) *Thacher v. Dinsmore*, 5 Mass.
299; *Forster v. Fuller*, 6 Mass. 58.

(*v*) *Brown v. Chase*, 4 Mass. 436;
Thacher v. Dinsmore, 5 Mass. 299;
Ex parte Leighton, 14 Mass. 207.

CHAPTER X.

CORPORATIONS.

A CORPORATION aggregate is, in law, a person; (*w*) and it was an established principle of the common law, that corporations aggregate could act only under their common seal; (*x*) but to this principle there were always many exceptions. These exceptions arose at first from necessity, and were limited by necessity. As where cattle were to be distrained damage feasant, and they might escape before the seal could be affixed. (*y*) But it was held that the appointment of a bailiff to seize for the use of a corporation, goods forfeited to the corporation, must be by deed. (*z*) A corporation is liable for the tortious acts of its agent, though he were not appointed under seal. (*a*) The exception was afterwards extended to all matters of daily or frequent exigency or convenience, and

(*w*) See the great case of the Louisville and Charleston R. R. Co. v. Letson, 2 How. 497, where it was decided by the Supreme Court that a corporation created by a State, and doing business within the territory of such State, though it have members who are citizens of other States, is to be treated in the United States courts as a citizen of that State. — By an act incorporating a railway company, no action was to be brought against any person for any thing done in pursuance of the act, without twenty days' notice given to the intended defendant: *Held*, that the word person included the company, and that they were entitled to notice upon being sued for obstructing a way in carrying the act into effect. *Boyd v. Croydon, R. Co.*, 4 Bing. N. C. 669.

(*x*) 1 Blackstone's Comm. 475. — Yet a corporation might do an act upon record without seal. The Mayor of Thetford's case, 1 Salk. 192.

(*y*) *Manby v. Long*, 3 Lev. 107; *Bro. Corporations*, pl. 2, 47; *Dean and Chapter of Windsor v. Gover*, 2 Saund. 305; *Plow.* 91. And so it seems the appointment of a bailiff to distrain for rent did

not need to be by deed. *Cary v. Matthews*, 1 Salk. 191; *Taunton, J., Smith v. Birmingham Gas Co.* 1 Ad. & El. 530. — But a corporation cannot, except by their seal, empower one to enter on their behalf for condition broken; and this though the estate be only for years. *Dumper v. Symms*, 1 Rol. Abr. *Corporations* (K.)

(*z*) *Horn v. Ivy*, 1 Vent. 47, 1 Mod. 18, 2 Keb. 567.

(*a*) *Eastern Counties Railway Co. v. Broom*, 2 E. L. & E. 406; *Watson v. Bennett*, 12 Barb. 196; *Burton v. Philadelphia &c. Railroad*, 4 Harring. 252; *Johnson v. Municipality*, 5 Louis. Ann. 100; *Goodspeed v. East Haddam Bank*, 22 Conn. 530. Especially if the act done was an ordinary service, such as would not be held under other circumstances to require an authority under seal. *Smith v. Birmingham Gas Co.* 1 A. & E. 526, 3 N. & Mann. 771; *Yarborough v. The Bank of England*, 16 East, 6. — And a corporation, like any other principal, is liable for acts of its agent incidental to an authority duly delegated. *Kennedy v. Baltimore Ins. Co.* 3 H. & Johns. 367.

of no especial importance. (*b*) In this country, the old rule *has almost if not entirely disappeared. (*c*) But in England it seems to remain in some force. (*d*) A contract of a corporation as of an individual, may be implied from the acts of the corporation, or of their authorized agents. (*e*) In general, if a person not duly authorized make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent. (*f*)

The question of execution appears to stand upon somewhat different ground from that of authority; for while a corporation is generally estopped from denying that a contract or an instrument was made by its authority, if it receive and hold the beneficial result of the contract or the instrument, as the price for property sold, or the like, it may, or its creditors may, deny that the instrument was legally executed, even if the authority were certainly possessed. Thus, if a conveyance purporting to be the conveyance of a corporation, made by one authorized to make it for them, be in fact executed

(*b*) *Gibson v. East India Co.* 5 Bing. N. C. 262, 270; *Lord Denman, C. J., Church v. Imperial Gas Co.*, 6 Ad. & El. 846. See *Bro. Corporations*, pl. 49.

(*c*) *The Bank of Columbia v. Patterson*, 7 Cranch, 299; *Bank of the United States v. Danbridge*, 12 Wheat, 64; *Danforth v. Schoharie Turnpike Co.*, 12 Johns. 227; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Parker, C. J., Fourth School District in Rumford v. Wood*, 13 Mass. 199; *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 297; *Chestnut Hill Turnpike v. Rutter*, 4 S. & Rawle, 16; *Union Bank of Maryland v. Ridgely*, 1 H. & Gill, 324; *Legrand v. Hampden Sydney College*, 5 Munf. 324.

(*d*) *Rolfe, B., Mayor of Ludlow v. Charlton*, 6 M. & W. 823; *Gibson v. East India Company*, 5 Bing. N. C. 275; *Lord Denman, C. J., Church v. Imperial Gas Co.*, 6 Ad. & El. 861; *Williams v. Chester & Holyhead Railway*, 5 E. L. & E. 497; *Diggle v. London & Blackwell Railway*, 5 Exch. 442; *Clark v. Guardians of Cuckfield Union*, 11 E. L. & E. 442. But see *Denton v.*

East Anglian Railway Co. 3 Carr. & Kir. 17.

(*e*) *Smith v. Proprietors, &c.*, 8 Pick. 178; *Kennedy v. Baltimore Ins. Co.*, 3 H. & Johns. 367; *Trundy v. Farrar*, 32 Maine, 225; *Ross v. City of Madison*, 1 Cart. (Ind.) 281; *Seagraves v. City of Alton*, 13 Ill. 366. — *Beverley v. Lincoln Gas Co.*, 6 Ad. & El. 829; where the judgment of the court of Queen's Bench was delivered by *Patteson, J.*, in an elaborate opinion. And in *Church v. Imperial Gas Company*, 6 Ad. & El. 846, the same court held that a corporation, created for the purpose of supplying gas, might maintain assumpsit for the breach of a contract by the defendant to accept gas from year to year, at a certain price per annum, the consideration being alleged to be the promise of the corporation to furnish it at that price — such promise by the corporation, though not under seal, being valid, and a good consideration.

(*f*) *Episcopal Charitable Society v. Episcopal Church*, 1 Pick. 372; *Hayward v. The Pilgrim Society*, 21 Pick. 270; *Randall v. Van Vechten*, 19 Johns. 60. And see *Foster v. Essex Bank*, 17 Mass. 479.

by the attorney as his own deed, it is not the deed of the corporation, although it was intended to be so, and the attorney had full authority to make it so. And if the deed be written throughout as the deed of the corporation, and the attorney when executing it declares that he executes it on *behalf of the company, but says, "in witness whereof I set *my hand and seal*," this is his deed only, and does not pass the land of the corporation. (g) If, however, it was only a

(g) *Brinley v. Mann*, 2 Cush. 337. The material parts of the deed in this case were as follows:—"Know all men, &c. that the New England Silk Company, a corporation legally established, by C. C., their treasurer, in consideration, &c. do hereby give, grant, &c." "In witness whereof, I, the said C. C., in behalf of said Company and as their treasurer, have hereunto set *my hand and seal*." The certificate of acknowledgment stated that "C. C., treasurer, &c. acknowledged the above instrument to be *his free act and deed*." The court held that this was not the deed of the corporation. See also *Combe's case*, 9 Co. R. 76, b; *Frontin v. Small*, 2 Stra. 705. No abler exposition of the doctrine of deeds by attorney is to be found in the books than that of Lord Chief Baron *Gilbert*, Bac. Abr. Leases, J. 10: "If one hath power, by virtue of a letter of attorney, to make leases for years generally by indenture, the attorney ought to make them in the name and style of his master, and not in his own name: for the letter of attorney gives him no interest or estate in the lands, but only an authority to supply the absence of his master by standing in his stead, which he can no otherwise do than by using his name, and making them just in the same manner and style as his master would do if he were present: for if he should make them in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose; yet such leases seem to be void, because the indenture being made in his name, must pass the interest and lease from him, or it can pass it from nobody: it cannot pass it from the master immediately, because he is no party; and it cannot pass it from the attorney at all, because he has nothing in the lands; and then his adding by virtue of the letter of attorney will not help it, because that letter of attor-

ney made over no estate or interest in the land to him, and, consequently, he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the master immediately, or through the attorney; for then the same indenture must have this strange effect, at one and the same instant to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do; and therefore all such leases made in that manner seem to be absolutely void, and not good, even by estoppel, against the attorney, because they pretend to be made not in his own name absolutely, but in the name of another, by virtue of an authority which is not pursued. This case therefore of making leases by a letter of attorney seems to differ from that of a surrender of a copyhold, or of livery of seizin of a freehold, by letter of attorney; for in those cases when they say, *We A. and B. as attorneys of C.*, or *by virtue of a letter of attorney from C.*, of such a date, &c., *do surrender, &c.*, or *deliver to you seizin of such lands*; these are good in this manner, because they are only ministerial ceremonies or transitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig; and when they do them as attorneys, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly; but in a lease for years it is quite otherwise, for the indenture, or deed, alone convey the interest, and are the very essence of the lease, both as to the passing it out of the lessor at first, and its subsistence in the lessee afterwards; the very indenture, or deed itself, is the conveyance, without any subsequent construction, or operation of law thereupon; and therefore it must be

simple contract which was executed in this way, it might be inferred from the general principles of the law of agency, that it would be valid as the contract of the corporation; for it would be a contract made by one as the agent of another, and containing the express declaration that it was so made.

A corporation may employ one of its members as its agent, and the same person, while such agent, may be also an agent for the other contracting party, and sign for him the memorandum required by the Statute of Frauds. (*h*)

Corporations authorized by their charter to act in a prescribed manner may by practice and usage make themselves liable on contracts entered into in a different way. (*i*) But it has been decided that corporations cannot exceed the powers given in their charters and make contracts not incidental or ancillary to the exercise of those powers, and that they are not estopped from setting up their own want of authority to make such contracts by the fact that they have been in the habit of entering into and fulfilling similar engagements, for a long period. (*ii*) This question may be regarded, however, as not yet fully determined.

In the absence of special provisions in the charter, or of by-laws lawfully made, the corporate acts of a corporation are the acts of a majority at a regular meeting, whether those present were or were not a majority of the members of the corporation. (*j*) And these corporate acts are binding upon all the members. (*k*) It does not seem to have been positively

made in the name and style of him who has such interest to convey, and not in the name of the attorney, who has nothing therein. But in the conclusion of such lease it is proper to say, *In witness whereof A. B. of such a place, &c., in pursuance of a letter of attorney hereunto annexed, bearing date such a day, hath put the hand and seal of the master, and so write the master's name, and deliver it as the act and deed of the master, in which last ceremony of delivering it in the name of the master by such attorney, this exactly agrees with the ceremony of surrendering by the rod, or making livery by a turf or twig, by the attorney, in the name or as attorney of his master.*

(*h*) *Stoddert v. Vestry of Port Tobacco Parish*, 2 G. & Johns. 227.

(*i*) *Witte v. Derby Fishing Company*, 2 Conn. R. 260; *Bulkley v. Derby Fishing Company*, 2 Conn. 252.

(*ii*) *Governor and Company of Copper Miners v. Fox*, 3 E. L. & E. 420; *Hood v. New York and New Haven Railroad Co.*, 22 Conn. 502.

(*j*) *Attorney-General v. Davy*, 2 Atk. 212.

(*k*) *Rex v. Varlo*, Cowp. 248; *Field v. Field*, 9 Wend. 394. — But where the act is to be done by a body within the corporation, and consisting of a definite number, a majority of that *body* must attend, and then a majority of those thus assembled will bind the rest. *The King v. Bellringer* 4 T. R. 810; *The King v. Miller*, 6 T. R. 268; *The King v. Bower*, 1 B. & Cress. 492; *Ex parte Willcocks*,

decided, whether this must be a majority of all the members present, or may be only a majority of all present and voting. But we think that it may be the latter. Otherwise, persons not voting would be counted as voting against the measure. As a majority of all present binds all the members, because all the members might be present, and perhaps because it is their duty to be present, so a majority of those present and voting should have the same force, because it is within the right and power and perhaps the duty of all present to vote, and so to express their dissent from any measure which they do not approve.

7 Cowen, 402.—The rule is perhaps the same where the act is to be done by the *corporation*, when that consists of a definite number. Lord *Kenyon*, *Rex v. Bellringer*, 4 T. R. 822. At common law, the corporation may delegate to a select body in itself its power of electing members or officers. *Rex v. Westwood*,

7 Bing. 1.—In a corporation composed of different classes, a majority of each class must consent before the charter can be altered, if there be no provision in the charter respecting alterations. *Case of St. Mary's Church*, 7 S. & Rawle, 517.

CHAPTER XI.

JOINT-STOCK COMPANIES.

IN England the statute of 7 & 8 Victoria, ch. 110, has the effect of making joint-stock companies, formed and registered in a certain way, quasi-corporations. In this country, wherever there are no similar statutory provisions, joint-stock companies are rather to be regarded as partnerships. The English statute above referred to defines a joint-stock company as "a partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners." (*l*) And this definition may be considered as applicable to such companies in this country. Although a joint-stock company is certainly not a corporation, yet it differs in some respects from a common partnership. A member of a partnership may assign his interest in the property of the firm; but the assignee does not become a partner unless the other copartners choose to admit him; and the interest so assigned being subject to all the debts of the partnership, it may be withheld by the partners for the purpose of settling the affairs of the firm, and until it is certain that there is a balance belonging to the partners, and until the share belonging to the assigning partner may, in whole or in part, be paid over to his assignee without injury to the creditors of the firm. (*m*) But in a joint-stock

(*l*) 7 & 8 Vict. c. 110, sec. 2. The same section proceeds to include also within the term Joint-Stock Company, all Life, Fire, and Marine Insurance companies, and every partnership consisting of more than twenty-five members.

(*m*) See *Pratt v. Hutchinson*, 15 East, 511; *Rex v. Webb*, 14 East, 406; *Josephs v. Pebrer*, 3 B. & C. 639; *Fox v. Clifton*, 9 Bing. 115; 6 Bing. 776, S. C.

The Bubble Act, (6 G. 1, c. 18,) made during the excitement produced by the South Sea Company, having been repealed by the statute 6 G. 4, c. 91, it was held in *Garrard v. Hardey*, 5 M. & Gran. 471, that the formation of a company, the stock in which should be transferable, was not an offence at common law. And the doctrine was reaffirmed in *Harrison v. Heathorn*, 6 M. & Gran. 81.

company provision is made beforehand for such transfer, and this is a principal object and effect of the division into shares.

*In other respects the differences between the law of joint stock companies and that of partnerships, (which is our next topic,) are not very many nor very important. (*mm*)

Some question has arisen as to the power of a managing committee to pledge the credit of the members of a society. And it is held that this must depend upon the rules and by-laws of the society. (*n*) Such a case is not likened to that of a partnership, but is governed by the law of principal and agent. (*o*) Nor has a member of a joint-stock company any implied authority to accept bills in the name of the directors or of the company. (*p*) The effect of becoming a subscriber to an intended company, in regard to the creation of a partnership between the members, as well among themselves as in reference to the public, has been before the courts; and it has been held that an application for shares and payment of the first deposit did not suffice to constitute one a partner, where he had not otherwise interfered in the concern; (*q*) and that the insertion of his name by the secretary of the company in a book containing a list of the members was not a holding of himself out to the public as a partner. (*r*) And this on the ground that such person does not thereby acquire a right to share in the profits.

But though there be some want of the necessary formalities or acts of a party to make himself legally a member, yet if he interpose and act as a member or director, (*s*) attend meetings, accept office, or otherwise give himself out to the public as such, either expressly, or by sufficient implication, then he will make himself liable as a partner. (*t*) And this even if

(*mm*) See remarks of Lord Campbell, in *Burness v. Pennell*, 2 Ho. of Lords Cases, 497.

(*n*) *Flemyng v. Hector*, 2 M. & W. 172. And see *Reynell v. Lewis*, 15 M. & W. 517.

(*o*) *Ibid.*

(*p*) *Bramah v. Roberts*, 3 Bing. N. C. 963; *Dickinson v. Valpy*, 10 B. & Cress. 128; *Steele v. Harmer*, 14 M. & W. 831.

(*q*) *Pitchford v. Davis*, 5 M. & W. 2; *Fox v. Clifton*, 4 M. & Payne, 676, 6

Bing. 776. Same case sent down for a third trial, 9 Bing. 115. And see *Bourne v. Freeth*, 9 B. & Cress. 632.

(*r*) *Fox v. Clifton*, 4 M. & Payne, 676.

(*s*) Lord *Denman*, *Bell v. Francis*, 9 C. & P. 66.

(*t*) *Doubleday v. Muskett*, 7 Bing. 110; *Tredwen v. Bourne*, 6 M. & W. 461; *Maudslay v. Le Blanc*, 2 C. & P. 409, note; *Braithwaite v. Skofield*, 9 B. & C. 401. And see *Harrison v. Heathorn*, 6 Scott, N.R. 735.

the company originated in fraud, to which he is not a party, nor privy; (*u*) or if a deed expressly required by the printed *prospectus to make him a partner has not been signed by him; (*v*) or even if the company has never been regularly and finally formed; (*w*) or has been abandoned; (*x*) or is insolvent. (*y*)

It seems that a member of such a company may sue the company for work and labor done, and money expended by him in their behalf. (*z*)

(*u*) *Ellis v. Schmoeck*, 5 Bing. 521; 3 M. & P. 220, S. C.

(*v*) *Maudslay v. Le Blanc*, 2 C. & P. 409, note. And see *Ellis v. Schmoeck*, 5 Bing. 521.

(*w*) *Abbott, C. J., Kearsley v. Codd*, 2 C. & P. 408, n.

(*x*) *Doubleday v. Muskett*, 7 Bing. 110.

(*y*) *Kearsley v. Codd*, 2 C. & P. 408.

(*z*) *Carden v. General Cemetery Co.*, 5 Bing. N. C. 253. But it is to be observed that this was so held with reference to an *incorporated* joint stock company; and some stress was laid in the decision upon the particular provisions

of the act of incorporation. And see *Perring v. Hone*, 4 Bing. 28.—A member of a joint-stock company, like a member of an ordinary partnership, may recover compensation for service rendered to the company previous to his having become a member of it. *Lucas v. Beach*, 1 M. & Gran. 417. In general, however, an action cannot be maintained by a member against the company, or by the company against a member, on a contract between him and the company. *Neale v. Turton*, 4 Bing. 149; *Wilson v. Curzon*, 15 M. & W. 532; *Holmes v. Higgins*, 1 B. & C. 74.

CHAPTER XII.

PARTNERSHIP.

Sect. I.—*What constitutes a Partnership.*

A PARTNERSHIP exists when two or more persons combine their property, labor, and skill, or one or more of them, in the transaction of business, for their common profit.

A partnership is presumed to be general when there are no stipulations, or no evidence from the course of business to the contrary. But it may be created for a specific purpose, or be confined by the parties to a particular line of business, or even a single transaction. When the partnership is formed by written articles, it is considered as beginning at the date of the articles, unless they contain a stipulation to the contrary. (a)

In general, persons competent to transact business on their own account may enter into partnership; the disabilities of coverture, infancy, and the like, applying equally in both cases. But interesting questions have been raised as to the rights and liabilities of those who represent infants. The personal liability of such a party would seem to depend upon the question whether he has claimed and exercised the right of withdrawing any part of the capital, or of receiving a share of the profits. Perhaps if he had by agreement the right to do this, and more certainly if he had actually withdrawn

(a) *Williams v. Jones*, 5 B. & Cr. 108. An attorney entered in a written contract, whereby he agreed to take into partnership in his business a person who had not then been admitted as attorney, and therefore could not be lawfully received. No time being expressly fixed for the commencement of the partnership, the court held that it was an agreement for a present partnership, and that parol evidence was not admissible to show that it was a conditional

agreement, which was not to take effect till the person to be received was admitted as attorney, and that it was therefore void. See *Dix v. Otis*, 5 Pick. 38.—But parties may agree to form a partnership at some future time, and until it arrives they will not be liable as partners, unless they have held themselves out as such. *Dickinson v. Valpy*, 10 B. & C. 128; *Avery v. Lauve*, 1 Louisiana Annual Rep. 457.

capital or profits, he would be held personally responsible for the debts of the partnership. (*b*)

Usually, the partners own together both the property and the profits; but there may be a partnership in the profits only. For as between themselves the property may belong wholly to one member of the partnership, although it is bound to third parties for the debts of the firm; as when it is bought wholly by funds of one partner, and the other is to use only his skill and labor in disposing of it, for a share of the profits. (*c*)

SECTION II.

OF THE REAL ESTATE OF A PARTNERSHIP.

All kinds of property may be held in partnership; but real estate is still subject, to a certain extent, to the rules which govern that kind of property. There is some conflict, and perhaps uncertainty, as to the right and remedies of partners and creditors in respect to real property which belongs to the partnership, both in England and in this country. But we consider the prevailing and the just rule to be, that when real estate is purchased with partnership funds, for partnership

(*b*) *Barklie v. Scott*, 1 Hudson & Brooke, 83. A. invested a sum of money for his infant son in a partnership on its formation, and it was stipulated, in a letter written by the other partners of the house, that they should correctly account with A., as the trustee of his son, for one third profit of his son's capital, or any loss that might accrue, and be governed and directed by his advice in all matters relative to the business. *Held*, that this letter did not constitute A. a partner, the jury having found that the money was not invested by A. for his own benefit, and that he had not reserved to himself the power of drawing out the principal or profits as trustee for his son, nor in fact drawn any.

(*c*) So where a broker, employed by a merchant to purchase goods, with the funds of the merchant, was to be one third interested in them, and not to charge commissions, and the correspondence between him and the merchant described the transaction as a *joint* con-

cern, the broker was held to be interested as a partner in the goods, and could pledge the whole of them. *Reid v. Hollinshead*, 4 B. & Cr. 867. *Abbott, C. J.* "Such a partnership may well exist, although the whole price is in the first instance advanced by one partner, the other contributing his time and skill and security in the selection and purchase of the commodities."—But where the broker merely acts as agent, and in lieu of commissions is to receive a certain proportion of the profits arising from the sale, and bear a certain proportion of the losses, the property in the subject of the sale does not vest in him as a partner, although he may be liable as such to third persons. *Smith v. Watson*, 2 B. & C. 401. So where one partner furnishes capital, and the other labor, mutual interest in the profits alone will not render the latter liable to the former for contribution for any loss of capital in the adventure. *Heran v. Hall*, 1 B. Monroe, 159.

purposes, it will be treated as partnership property, and held like personal property, chargeable with the debts of the firm, and with any balance which may be due from one partner to the other, upon the winding up of the affairs of the firm. (d) But it seems to be the prevailing rule in this country, that as between the personal representative and the heirs of a deceased partner, his share of the surplus of the real estate

(d) *Goodburn v. Stevens*, 5 Gill, 1; *Buchan v. Sumner*, 2 Barbour, Ch. 165, 197-207, where several leading cases are reviewed; *Buckley v. Buckley*, 11 Barb. 44; *Piatt v. Oliver*, 3 McLean, 27; *Rice v. Barnard*, 20 Verm. 479; *Overholt's Appeal*, 12 Penn. 222; *Buck v. Winn*, 11 B. Mon. 322; *Owens v. Collins*, 23 Ala. 837; *Cox v. McBurney*, 2 Sandf. 561. "So far as the partners and their creditors are concerned, real estate belonging to the partnership is treated in equity as personal property, and subjected to the same general rules." Assistant V. C., *Delmonico v. Guillaume*, 2 Sandf. Ch. 336. And where the real estate is purchased for partnership purposes on partnership account, it is immaterial whether the purchase is made in the name of one partner or of all, or of a stranger. *Boyers v. Elliott*, 7 Humph. 204; *Hoxie v. Carr*, 1 Sumner, 182. In this last case, *Story, J.*, says, "A question often arises, whether real estate, purchased for a partnership, is to be deemed for all purposes personal estate like other effects. That it is so, as to the payment of the partnership debts, and adjustment of partnership rights, and winding up the partnership concerns, is clear, at least in the view of a court of equity. But, whether it becomes personal estate as between the executor or administrator of a deceased partner and his heir or devisee, is quite a different question, upon which learned judges have entered opposite opinions. The whole doctrine as between such claimants, must turn upon the presumed intention of the deceased partner; whether by leaving it in the state of being real property he meant, as between his personal representatives and his heirs and devisees, that it should retain its true and original character; or whether, having appropriated it as partnership property, it should assume the artificial character belonging to the other personal funds of the firm." See *Sigourney v. Munn*,

7 Conn. 11.—In *Buchan v. Sumner*, already cited, Chancellor *Walworth* states it to be the *English* rule, "that real estate belonging to the firm, unless there is something in the partnership articles to give it a different direction, is to be considered, in equity, as personal property; and that it goes to the personal representative of the deceased partner, who was beneficially interested therein."—*Wooldridge v. Wilkins*, 3 V. E. Howard, 372. After reviewing *Greene v. Greene*, 1 Hamm. 244, and *Thornton v. Dixon*, 3 Bro. Ch. 199, the court say, "The result of these cases we take to be, that lands purchased by partners, under an agreement that they shall be sold for the benefit of the partnership, will be regarded as joint-stock, and will be likewise so considered, though there be no agreement, if there be such an application or use of them to the purposes of the concern, as evidences an original understanding of the parties that they are to be treated as such, and not as an estate in common." See *Dyer v. Clark*, 5 Met. 562.—See *West v. Skip*, 1 Ves. Sen. 242; *Phillips v. Phillips*, 1 M. & K. 663. Sir *John Leach*, M. R., in this last case said, that notwithstanding older authorities, he considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have to every intent the quality of personal estate. And this is confirmed in *Broom v. Broom*, 3 M. & K. 443. See *Pugh v. Currie*, 5 Ala. N. S. 446.—In *Pierce v. Trigg*, 10 Leigh, 427, *Tucker, P.*, after reviewing the *Virginia* cases, adds, "Upon the whole I am of opinion that the late *English* cases propound the true rule, and that real estate, purchased with partnership funds and for partnership purposes, must be regarded as partnership stock, and treated as personalty."

of the partnership, after all its debts are paid, and the equitable claims of its members are adjusted, will be considered and treated as real estate. (*dd*) It has been held, that * the real estate of a partnership does not acquire the incidents or liabilities of personal estate, unless there be an agreement of the partners to that effect; and that then this change in the legal nature of the property results from this agreement, (*e*) but we doubt the accuracy of this ruling; unless it is admitted that such agreement may be inferred from the purchase of the property by partnership funds, and the use

(*dd*) *Goodwin v. Richardson*, 11 Mass. 469. In this case an estate was mortgaged to two partners, who acquired an absolute title by foreclosure, and the court held that it thereby vested in them as tenants in common, and on the death of one partner was, as to his moiety, to be treated as his separate estate. See *Hoxie v. Carr*, 1 Sumn. 185, where *Story, J.*, says that this decision "turns upon a mere point of local law, under a local statute, and does not dispose of the equities between the parties resulting from general principles." In *Yeatman v. Woods*, 6 Yerg. 20, it was held that real estate held by partners, for partnership purposes, descends and vests in the heir at law of a deceased partner, as real estate in other cases. In *Deloney v. Hutcheson*, 2 Rand. 183, it is said that "the surviving partner, if he be a creditor, can have no other remedy against the real estate than any other creditor can have." In *Lawrence v. Taylor*, 5 Hill, 111, it is said, "Out of the court of chancery, real estate, though belonging to partners and employed in the partnership business — the title standing in their joint names — is deemed to be holden by them as tenants in common, or joint tenants for all purposes."

(*e*) In *Coles v. Coles*, 15 Johns. 159; *Thornton v. Dixon*, 3 Brown. Ch. R. 199; *Bell v. Phynn*, 7 Ves. 453; *Balmain v. Shore*, 9 Ves. 500, language is used which might have this interpretation. In *Smith v. Jackson*, 2 Edw. Ch. 28, the Vice-Chancellor said, "If at the time of forming the partnership, the parties agree to invest a part of their capital in the purchase of real estate for partnership purposes, or should at any time afterwards find it expedient to do so, and agree between themselves that,

upon the dissolution, the real as well as personal estate shall be sold and turned into money, for the purpose of paying the partnership debts and closing their joint concerns, there the court of Chancery, acting upon the agreement, and considering that as done which was agreed to be executed, is warranted in regarding the whole as personalty, either in reference to the claims of creditors, or the rights of the heir or next of kin of a deceased partner. . . . But if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid for out of their joint fund, and to be used for partnership purposes, I am of opinion it must still be deemed real estate." *Ripley v. Waterworth*, 7 Ves. 425. (1802.) Lord *Eldon* in this case held to the effect that if an intention to convert the real property of the partnership can be gathered from the general tenor of the partnership deed, coupled with the nature of the partnership dealings, that intention must prevail to the full extent of converting the real property, as between the real and personal representatives of the deceased partner; although the property might not have been purchased with partnership funds, and no conversion might be necessary for the payment of the partnership debts. *Collyer*, Part. sect. 142; *Selkrig v. Davies*, 2 Dow, 242. (1814.) Lord *Eldon*. "My own individual opinion is, that all property involved in a partnership concern ought to be considered as personal." See also the judgment of Lord *Eldon* in *Crawshay v. Maule*, 1 Swanston, 521, and *Townsend v. Devaynes*, 1 Montague on Partnership, App., note (2 A.)

of it for partnership purposes. It seems that improvements made with partnership funds on real estate belonging to one * of the partners, will be treated as the personal property of the partnership. (*f*)

The widow has her dower in the estate after the debts are paid, but not until then. (*g*) Although the legal title is protected, the party having such title is held, if necessary, as trustee for partnership purposes, or for the surviving partner. And if a partner buys lands out of partnership funds, and takes title to himself, he may be held as trustee for the partnership. (*h*) It is to be remembered, however, as before

(*f*) *Averill v. Loucks*, 6 Barbour, Sup. Ct. 28.

(*g*) *Goodburn v. Stevens*, 5 Gill, 1; *Greene v. Greene*, 1 Ham. 244; *Richardson v. Wyatt*, 2 Desau. 471; *Woolbridge v. Wilkins*, 3 V. E. Howard, 360, 371; *Burnside v. Merrick*, 4 Met. 541; *Dyer v. Clark*, 5 Met. 562. In this last case the liabilities of partnership property to partnership creditors were elaborately considered in the decision of the court, the purport of which is given in the head note, as follows:—When real estate is purchased by partners, with the partnership funds, for partnership use and convenience, although it is conveyed to them in such a manner as to make them tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, it will be considered and treated, in equity, as vesting in them, in their partnership capacity, clothed with an implied trust that they shall hold it, until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. Upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so in-

demnified. See *Howard v. Priest*, 5 Met. 582; *Peck v. Fisher*, 7 Cush. 386. — *Smith v. Smith*, 5 Ves. 189. The estates in this case were held subject to dower, having been purchased with the partnership fund, but conveyed to one partner under a specific agreement that they should be his, and he should be debtor for the money. Lord Chancellor *Loughborough* said, "If these estates had only been conveyed to one partner, having been purchased with the partnership funds, they would have been part of the partnership property. But that was not the nature of the transaction. The distinction is, the agreement as to the purchase of these houses was specific. Upon that they never could be specifically divided, as if they were part of the partnership stock; but when they came to settle, the houses were Robert Smith's, and he was debtor for so much money."

(*h*) *Pierce v. Trigg*, 10 Leigh, 406. *Tucker, P.*, (with whom *Cabell, J.*, agreed) after a review of the English cases said, "I think then the doctrine laid down in *Gow on Partnership*, 51, and 3 Kent, Comm. 37, may now be taken as settled in England; namely, that real estate purchased for partnership purposes with partnership funds, and used as a part of the stock in trade, is to be considered to every intent as personal property, not only as between the members of the partnership respectively, and their creditors, but also as between the surviving partner and the representatives of the deceased. The legal title may indeed be in the heir, but let the legal title be in whom it may, it is in equity deemed partnership property, and the partners

stated, that this rule extends only so far as may be made necessary by the business or debts of the partnership, and as soon as this necessity ceases, any remaining real estate has all the incidents of real property, as to conveyance, inheritance, and dower. And where the land purchased with the partnership funds is afterwards sold by the partner who has the legal title to the whole, or to a part as tenant in common, neither the firm nor its creditors have any lien on the land for partnership purposes, against a purchaser without notice or knowledge, where the deed to the partners did not describe them as members of a firm, or partners, or otherwise indicate the

are deemed *cestuis que trust* thereof, while the holder of the legal title is but a trustee for the partnership." In *Pugh v. Currie*, 5 Ala. N. S. 446, the court say, "It can make no difference whatever that the land was entered in the name of the deceased partner—the heirs will, in a court of equity, be considered as trustees of the surviving partner." In the case of *Burnside v. Merrick*, 4 Met. 541, *Shaw, C. J.*, having stated the question to be, whether real estate, purchased by partners, for partnership business, and with partnership funds, but conveyed to them by such a deed as, in case of other parties, would make them tenants in common, would be considered as partnership stock, said, "Though there has been much diversity of judicial opinion upon the subject, we think the prevailing opinion now is, that real estate, so acquired, is to be considered at law as the several property of the partners, as tenants in common: yet that it is so held, subject to a trust, arising by implication of law, by which it is liable to be sold, and the proceeds brought into the partnership fund, as far as is necessary to pay the debts of the firm, and to pay any balance which may be due to the other partners, on a final settlement; and cannot be held by the separate owner, except to the extent of his interest in such final balance. And it follows as a necessary consequence, that when the firm is insolvent, the whole of the property, so held, must be brought into the partnership fund, in order to satisfy the partnership creditors, as far as it will go for that purpose." See *Buchan v. Sumner*, 2 Barb. Ch. 165; *Smith v. Tarlton*, 2 Barb. Ch. 236;

McGuire v. Ramsey, 4 Eng. (Ark.) 518; *Hoxie v. Carr*, 1 Sumn. 182. In the case of *Phillips v. Crammond*, 2 Wash. C. C. 445, *Washington, J.*, in delivering his opinion, said, "The general principle is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same, and consider the purchase as made for his use, and the purchaser a trustee for him. Upon the same principle, I conceive that a resulting trust would arise to a partnership concern in lands purchased by one of the partners, and paid for out of the joint funds."

But this species of resulting trust is open to certain qualifications, amongst which it is proper to notice the following, viz.: that the person whose money was invested in the purchase, is not obliged to take the land, and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and to claim the money instead of the property. As a consequence of this, and because the claim to a resulting trust is merely that of an equity, founded upon the presumptive intention of the parties, that equity may be rebutted, even by parol evidence, and circumstances to defeat it. If, for instance, the person for whose benefit the trust would otherwise be created, declares that the purchase was not made for him, or if both parties treat it as a purchase for the use of him to whom the conveyance was made, no resulting trust will arise." But the partner has no interest in the estate

fact that the land was purchased as partnership property. (i) But *a purchaser with actual or constructive notice that the land is partnership property, holds it chargeable with the debts of the partnership, although he had no knowledge of those debts. (j)

SECTION III.

OF THE GOOD WILL.

The good-will of an establishment may be considered, at least for some purposes, as a partnership property. If it could not be attached, it might still be assigned for the benefit of creditors. Perhaps it would pass to the assignees of a bankrupt or insolvent, by operation of law; but not so as to carry with it any obligation of further labor or responsibility on the part of the insolvent, to make the good-will available. (k)

purchased in his copartner's name, unless it was intended or used for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561.

(i) It has been held that real estate, used by the partners for partnership purposes, but conveyed to them in fee as *tenants in common*, and afterwards mortgaged by one partner without notice to the mortgagee of existing partnership debts, is to be considered real estate as between the mortgagee and the partnership creditors, and liable in the first instance to the mortgagee. *McDermont v. Laurence*, 7 S. & R. 438. *Tilghman, C. J.*, said, "Land, except for the purpose of erecting necessary buildings, is not naturally an object of trade or commerce. Yet there is no doubt, that by the agreement of the partners, it may be brought into the stock, and considered as personal property, so far as concerns themselves and their heirs and personal representatives. But if a conveyance of land is taken to partners as tenants in common, without mention of any agreement to consider it as stock, and afterwards a stranger purchases from one of the partners, it would be unjust if without notice he should be affected by any private agreement." See also *Forde v.*

Herron, 4 Munf. 321. In this case, *Roane, J.*, in delivering the judgment of the court, said, "The court is of opinion that, although real property, purchased with the effects and used for the purposes of a mercantile firm or copartnery, may, in equity, be liable to discharge the balance due from the company to any partner, in preference to the private and individual debt of any other partner, it is nevertheless competent to the members of such copartnery to acquire such property jointly, as individuals, or to lose the lien aforesaid, (generally existing upon the social property,) by acts tending to mislead or deceive creditors or purchasers in this particular." See also *Marvin v. Trumbull*, Wright, (Ohio,) 386.

(j) *Hoxie v. Carr*, 1 Sumner, 182.

(k) *Dougherty v. Van Nostrand*, Hoff. Ch. R. 68. It has been held that the good-will of a partnership is not partnership stock, and survives. *Hammond v. Douglas*, 5 Ves. 539. This was doubted in *Crawshay v. Collins*, 15 Ves. 227. But *Hammond v. Douglas* was sustained in *Lewis v. Langdon*, 7 Simons, 421. The good-will of an establishment is recognized as a valuable interest in equity. *Kennedy v. Lee*, 3

SECTION IV.

OF THE DELECTUS PERSONARUM.

The partnership must be voluntary; and therefore no partner and no majority of partners can introduce a new member without the consent of the others. The *delectus personarum* is always preserved; and if one partner sells out his interest in *the firm, this works a dissolution of the partnership, which can only be renewed by the agreement of all. But such transfer may give to a *bonâ fide* purchaser all the right of the partner selling out, to his share of the surplus upon a settlement. (l)

SECTION V.

HOW A PARTNERSHIP MAY BE FORMED.

A partnership may be formed by deed, or by parol; and with or without a written agreement. (m) But the law will

Meriv. 452; *Kuott v. Morgan*, 2 Keen, 213; *Bell v. Locke*, 8 Paige, 75. As to the proper meaning of the term "Good-will," as used in trade, and the nature and extent of the rights which pass by an assignment of the "Good-will" of a business, see *Harrison v. Gardner*, 2 Madd. 198.

(l) *Gilmore v. Black*, 2 Fairfield, 488; *Griswold v. Waddington*, 15 Johns. 82; *Moddewell v. Keever*, 8 W. & S. 63. The assignment of shares in the stock of an unincorporated company, the certificates of which contained a provision that they should not be assigned without the consent of the directors and treasurer, being made without their assent, does not make the assignee a partner, or enable him to bring a bill in equity to compel the partners to account. *Kingman v. Spurr*, 7 Pick. 235. *Parker, C. J.*, said, "It is a settled principle, that a company or copartnership cannot be compelled to receive a stranger into their league. These associations are founded in personal confidence and *delectus personarum*. It is even held, that an executor or heir of one of the mem-

bers does not become a member, unless by consent or by the terms of the compact." Compare this case with *Alvord v. Smith*, 5 Pick. 232. See *Murray v. Bogert*, 14 Johns. 318; *Marquand v. N. Y. Man. Co.* 17 Johns. 535. That no partner can be introduced by mere sale and transfer to him of a partner's interest, see *Mathewson v. Clarke*, 6 How. 122; *Mason v. Connell*, 1 Whart. 381; *Putnam v. Wise*, 1 Hill, (N. Y.) 234. See also *Channel v. Fassitt*, 16 Ohio, 166; *Crawshay v. Maule*, 1 Swanst. 508.

(m) *Owen ex parte* 7 E. L. & E. 305; *Smith v. Tarlton*, 2 Barb. Ch. R. 336.—Although ordinary partnerships may be formed without any written contract, and the acts and words of the parties are ordinarily sufficient for that purpose, yet if the object of the company be to speculate in the purchase and sale of land, the positive rules of law and the Statute of Frauds require the partnership agreement to be in writing, and a court of equity will not enforce a parol contract for such a purpose. *Smith v. Burnham*, 3 Sumner, 435; *Henderson v. Hudson*,

not give effect to an agreement to form a partnership for illegal transactions or purposes. (n) An action cannot be maintained for the breach of an agreement to become a partner, unless the terms of the intended partnership were specific and are clearly proved. (o) But where a partner in an existing firm agreed that a certain person should be received as a partner in that firm, it was held that an action might be maintained for a breach of that agreement, and some uncertainty in the terms of the agreement, was not a sufficient defence. (p)

A partnership, in general, is constituted between individuals, by an agreement to enter together into a general or a particular business, and share the profits and the losses thereof. (q) And this, however unequal the shares may be,

1 Munf. 510. Ridgway's Appeal, 15 Penn. 177. But this is said in a late case to apply only to the contract between the parties, and that as to third persons the partnership may be proved like any other. *In re Warren, Daveis*, 320.—If articles of partnership exist, a creditor of the firm may still prove the partnership by parol. *Griffin v. Doe*, 12 Ala. 783. But the evidence of a partnership must be submitted to the jury. *Drake v. Elwyn*, 1 Caines, 184. For the existence of a partnership or joint connection is a question of fact. *Beecham v. Dodd*, 3 Harring. 485. Whether the terms of the agreement and the facts as found by the jury constitute a partnership, is a question of law. *Id.*; *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McCord, 20; *Gilpin v. Temple*, 4 Harring. 190.

(n) *Armstrong v. Lewis*, 2 Cr. & M. 274; *Ewing v. Osbaldiston*, 2 My. & Cr. 53. But where two persons carried on the business of pawnbrokers under a deed of partnership; and the business was conducted solely in the name of one, and he only was licensed: *Semble*, that although the parties might have made themselves liable to penalties imposed by the statute 39 & 40 Geo. 3, c. 99, yet, that it being no part of the contract to carry on the partnership in such a manner as to contravene the law, the contract was not void. If however a collateral agreement so to conduct the partnership had been proved, its illegality would have prevented either party

from acquiring any right under the partnership.

(o) *Figes v. Cutler*, 3 Starkie, 139.

(p) *McNeill v. Reid*, 9 Bing. 68. *Tindal*, C. J., said, "The other point for our consideration under this head of objection is, that the contract is too vague, too uncertain, as to the term of partnership, amount of capital to be contributed, and the like, to be the subject of estimate by a jury. But is that a correct statement of the evidence? It is plain that the plaintiff considered, and that the defendant led him to consider, that he was contracting for a fourth part of the defendant's business, in the room of Muspratt, who had quitted it; and that both the defendant and his agent, Carstairs, knew the precise extent and value of such an interest. That being so, the case is clear of the difficulty which arose in *Figes v. Cutler*, where the evidence was too indistinct to enable the jury to come to any conclusion. It is unnecessary to advert to the cases in equity, because this is not a proceeding to enforce performance of a contract, but to obtain damages for the breach of it."

(q) *Langdale, ex parte*, 18 Ves. 300. In this case the Lord Chancellor, (*Ellen*) said, "The criterion of a partnership is whether the parties are to participate in profit. That has been the question ever since the case of *Groves v. Smith*." If the actual contract give a claim upon the profits, or the application of them, that is partnership. See

and even if one of the parties has no direct interest or property in the capital of the firm. In the absence of specific stipulations or controlling evidence, the presumption of law is, that the partners share the profits equally. (*r*) The articles may provide or omit a period for the continuance of the partnership. But if such a period be provided and the time expires, and then the partnership is renewed by agreement, it has been held that the new partnership is founded upon the same terms as the old one, in the absence of opposing testimony. (*s*)

It is certain that persons may be copartners as to third parties, and brought within all the liabilities of partnership as to them, who are not partners between themselves. (*t*) For whether they are partners as between themselves is deter-

Ex parte Hamper, 17 Ves. 403, Sumner's Ed. & note, p. 404; Cushman v. Bailey, 1 Hill, 526; Belknap v. Wendell, 1 Foster, 175; Catskill Bank v. Gray, 14 Barb. 471.—A participation in the uncertain profits of trade, renders one a copartner in respect of the liabilities of the concern to third persons. *Oakley v. Aspinwall*, 2 Sandf. Sup. Ct. R. 7; *See Bucknam v. Barnum*, 15 Conn. 67; *Cushman v. Bailey*, 1 Hill, 526. See also, on this subject, *Mair v. Glennie*, 4 M. & Sel. 240; *Smith v. Watson*, 2 B. & Cr. 401; *Hesketh v. Blanchard*, 4 East, 144; *Reid v. Hollinshead*, 4 B. & Cr. 867; *Everitt v. Chapman*, 6 Conn. 347; *Harding v. Foxcroft*, 6 Greenl. 76; *Thorndike v. De Wolf*, 6 Pick. 124; *Jackson v. Robinson*, 3 Mason, 138; *Griffith v. Buffum*, 22 Verm. 181.

(*r*) *Peacock v. Peacock*, 16 Ves. 49; *Farrar v. Beswick*, 1 Mood. & Rob. 527; *Gould v. Gould*, 6 Wend. 263. But see *Thompson v. Williamson*, 7 Bligh, 432.

(*s*) *Dickinson v. Survivors of Bolds and Rhodes*, 3 Desau. 501. This was a bill in equity for an account of the profits of a copartnership. The only question in the case was as to how long the partnership continued. It appeared by the original articles that it commenced in 1787, under an agreement to continue seven years. After the expiration of that period, the defendants, being desirous of renewing the connection, transmitted to the complainant in London, where he resided, the articles

of copartnership, with an indorsement of a renewal of them for another term of seven years, to commence from the expiration of the former one. The complainant, in answer to this communication, said he would agree to the proposition, on the happening of a certain contingency. It did not distinctly appear whether the contingency happened or not. But it did appear that the complainant continued to discharge his duties as a partner in the same manner as formerly. On this evidence the defendants contended that the partnership was not renewed for seven years, but was determinable at the pleasure of either party. But the court held that the complainant's continuing to discharge his former duties on the original terms, was a substantial acceptance of the defendants' proposition, and so the partnership was renewed for another term of seven years.

(*t*) If parties are so associated in business as to make them partners with respect to third persons, but expressly agree that a partnership shall not exist, they are not partners as between themselves. *Gill v. Kuhn*, 6 Serg. & Rawle, 333; *Hesketh v. Blanchard*, 4 East, 144. If however parties by their conduct have treated their contract as a partnership, and have so held themselves out to the world, it is unnecessary to put a construction upon the written contract, as between themselves and others. *Stearns v. Haven*, 14 Verm. 540.

mined chiefly by reference to their own intention; but whether they are partners in respect to third parties is determined by a consideration of this intention, and also of that actual participation of profits which is held to require of them to participate in the losses, because it diminishes the fund from which the losses are to be paid; (u) and also of the way and *degree in which the person sought to be charged as partner has been held out to the world as such, so that the person seeking to charge him had good reason to believe a debt of the partnership carried with it his responsibility. (uu)

If one lends money to be used by the borrower in his business, the lender to receive interest, and in addition thereto a share of the profits of the business, a question may arise whether he is a lender on usury, or a partner. He would seem indeed to be both; only a usurer as between the lender and borrower, but a partner as to third persons; and it may depend upon the manner in which the question is presented, whether the character of a usurer is to be fixed upon him. If he sues the borrower for repayment of the money, it seems to be competent for the borrower to allege in his defence the usurious character of the loan. (uv) But if a third party, who is a creditor of the borrower, upon a debt which has arisen in the business in which the money was lent to be used, sues the lender as a partner, on the ground that he took away profits to which the creditor might look for his debt, the lender will be held as such partner, and it is not competent for him to set up his contract as usurious, for he may not rest his defence upon his own wrong. (v)

A question has frequently arisen where a clerk, agent, or salesman has been taken into partnership, to render in fact the same services as before, or a person received to render such services who had not been previously employed, upon an agreement that the services shall be compensated not by a salary, but by a share of the profits. Is such person a part-

(u) As to what participation of profits makes one a partner, see *infra*, n. (w.)

(uu) *Cottrill v. Vanduzen*, 22 Verm. 511; *Gilpin v. Temple*, 4 Harring. 90; *Furber v. Carter*, 11 Humph. 271.

(uv) *Morse v. Wilson*, 4 T. R. 353.

See also *Gilpin v. Enderbey*, 5 B. & Ald. 954, s. c. 5 Moore, 571.

(v) *Grace v. Smith*, 2 W. Bl. 998; *Morse v. Wilson*, 4 D. & E. 353; *Case of Lane, Fraser & Boylston*, cited in 17 Vesey, 405, Sumner's edition.

ner as to third parties? It will appear, by the cases cited in the notes, that there is some uncertainty upon this point. From many of the cases it would seem that a rule of this kind was adopted; namely, that where the bargain was that A. should receive for his services one tenth of the profits, this made him a partner; but if he was to receive a salary, equal in amount to the one tenth part of the profits, this did not make him a partner. This rule is somewhat technical, but not altogether so; and would doubtless be applied * to such a contract now, if the words used were not accompanied by other language, or by facts which required, or at least justified a different interpretation. Whether a person were a partner with others, should be determined in this as in other cases by a consideration of their intention, and of the way in which the alleged partner was held forth to the public, and the interest and power he had in or over the fund to which the creditors of the partnership could look for their security. Where A. employs B., and agrees to give him in lieu of wages, or by way of wages, a certain proportion of A.'s profits, this need not give B. any right to control the business or interfere therein in any way. They are not then necessarily partners; because there is no reciprocity between them: unless some other sufficient reason exists for so treating them. But the reason usually alleged as that for which he who shares in the profits is held liable as a partner for the debts, namely, that he has diminished the fund from which the debts are to be paid, seems to be regarded as not applicable to one who takes wages, though they may be measured by the profits; and if this is the bargain in fact, the manner of its expression would seem not to be material. It is certain that while the salesman took a thousand dollars a year as wages for his services, this did not make him a partner. The fund to pay debts grew up in some measure from his services, and he was entitled to be paid out of it for them; and if he now has, instead of a fixed salary, a share of the profits, it might still be clear from the contract and circumstances, that the arrangement was intended not to pay him more than his services were worth, but only to make his wages dependent in some degree upon his services, and so to stimu-

late him to make the profits, or the general fund to which the creditors must look, as large as possible. Lord Eldon's reason for the rule seems to be, "that where the salesman has an amount of money equal to one tenth of the profits, this gives him no action of account, and therefore he is not a partner; but where he is to receive one tenth of the profits, this gives him an action of account and therefore makes him a partner;" but this seems open to the objection, that the question of partnership is prior, and should determine the right of account; whereas this reason would regard the right of account as prior, * and determining the question of partnership. (*w*) Lord El-

(*w*) It seems to be well settled, that a contract to pay one employed in certain business a salary, *equal in amount* to a certain proportion of the profits, will not make such person a partner. The question of profits is of importance only in determining the amount of salary. Neither will a certain salary, together with a commission of a certain per cent. upon the profits, make the receiver a partner. *Miller v. Bartlet*, 15 S. & R. 137; *Stocker v. Brockelbank*, 5 E. L. & E. 67; *Dunham v. Rogers*, 1 Barr, 255; *Denny v. Cabot*, 6 Met. 82; *Hodgman v. Smith*, 13 Barb. 302; *Brockway v. Burnap*, 16 Barb. 309. And the better opinion seems now to be, that an agreement by which a person is to receive a *certain portion of the profits* for his salary, does not constitute a partnership, such person having no specific interest in the profits themselves, as profits. See *Loomis v. Marshall*, 12 Conn. 69; *Burckle v. Eckart*, 1 Denio, 337; S. C. 3 Comst. 132; *Vanderburgh v. Hull*, 20 Wend. 70; *Ogden v. Astor*, 4 Sandf. 311; *Newman v. Bean*, 1 Foster, 93; *Reed v. Murphy*, 2 Greene (Iowa) 574; *Goode v. McCartney*, 10 Tex. 193; *Glenn v. Gill*, 2 Maryl. 1; *Drake v. Ramey*, 3 Rich. 37; *Bartlett v. Jones*, 2 Strob. 471; *Hodges v. Dawes*, 6 Ala. 215; *Wilkinson v. Jett*, 7 Leigh, 115. But see *Heyhoe v. Burge*, 9 Com. Bench, 431; *Taylor v. Terme*, 3 Har. & Johns. 505; *Everitt v. Chapman*, 6 Conn. 351.—In *Bradley v. White*, 10 Metc. 303, it was held that an agreement between D. and W., by which D. was to furnish goods for a store, and pay all the expenses, and W. was to transact the business of the store and receive half of the profits, as a *compensation for*

his services, did not constitute W. a partner, and that in an action against D. & W. for goods sold and delivered to D., W. was not liable. See also *Ambler v. Bradley*, 6 Verm. 119; *Blanchard v. Coolidge*, 22 Pick. 151. This question also underwent much discussion in *Denny v. Cabot*, 6 Metc. 82. The court there said, "On this point the distinction appears to us to be well established, that a party who participates in the profits of a trade or business, and has an interest in the profits, as profits, is chargeable as a partner with respect to third persons; but if he is only entitled to receive a certain sum of money, in proportion to a given quantum of the profits, as a compensation for his labor and services, he is not thereby liable to be charged as a partner. It is true that Lord Eldon has expressed a doubt of the soundness of this distinction. In *Ex parte Hamper*, 17 Ves. 404, he says, 'The cases have gone to this nicety, (upon a distinction so thin, that I cannot state it as established upon due consideration,) that if a trader agrees to pay another person, for his labor in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner.' He admits, however, that the law of partnership is thus settled. *Ex parte Watson*, 19 Ves. 459; *Ex parte Rowlandson*, 1 Rose, 92. And this distinction has been confirmed by numerous subsequent decisions. In *Cutler v. Winsor*, 6 Pick. 335, it was decided, that an agreement between the owner and master of a vessel to divide the earnings of the

don says "the cases have gone to this nicety," and speaks of

vessel between them, after deducting certain fixed charges, did not render them liable to third persons as partners. In that case the deduction was from the gross earnings. And the agreement is substantially the same in the present case. For although, in terms, the agreement was to pay Cooper one third of the net earnings, yet that is explained by the words immediately following, by which it appears that Cooper was entitled to one third of the gross profits, after deducting certain specified charges; and that in no event was he to be liable for any losses. So the agreement in this case is precisely similar to that in *Loomis v. Marshall*, 12 Conn. 69. In that case, French and Hubbell agreed with Marshall to manufacture his wool into cloth, and he agreed to give them, for their services, and the materials they should furnish, a certain proportion of 'the net proceeds of all the cloths, after deducting incidental and necessary expenses of transporting and other proper charges of sale.' It was not expressed in terms to be for such compensation, but such the court held was the legal meaning of the agreement. This case was very ably discussed by the learned judge who delivered the opinion of the court, and, as it seems to us, the decision is fully sustained by well-established principles. So in *Reynolds v. Toppan*, 15 Mass. 370, it was agreed between the master and owner of a vessel, that the latter was to receive two fifths of the net earnings of the vessel; and it was held that this did not render him liable as a partner. So in *Vanderburgh v. Hull*, 20 Wend. 70, where a person was employed as an agent in conducting the business of a foundry, at a salary of \$300; and in addition thereto he was to receive one third of the profits of the foundry, if any were made; and he had nothing to do with the losses; it was held, that the agent was not, either as to his employers or third persons, a partner. So in *Turner v. Bissell*, 14 Pick. 192, it was agreed that Bissell was to furnish wool to be worked into satinets by Root, who was to find and pay for warps for the same, and Bissell was to pay Root for working the wool, finding the warps, &c., 40 per cent. on the sales of the satinets. It was held, that the defendants were not partners *inter se*, nor as to third per-

sons."—And in farther exposition of this principle it is said, "If a person stipulate for a share in the profits, so as to entitle him to an account, and to give him a specific lien, or a preference in payment, over all creditors, and giving him the full benefit of the profits of the business, without any corresponding risk in case of loss; justice to the other creditors would seem to require that he should be holden to be liable to third persons as a partner. But where a party is to receive a compensation for his labor, in proportion to the profits of the business, without having any specific lien upon such profits, to the exclusion of other creditors, there seems to be no reason for holding him liable, as a partner, even to third persons. This distinction is supported by Cary, in his treatise on Partnership, and Chancellor Walworth considers it as a sound one, in *Champion v. Bostick*, 18 Wend. 184. And it is adopted with approbation by Chancellor Kent, in his Commentaries. 3 Kent Com. (4th ed.) 25, note. The remarks of Judge Story on these distinctions are very forcible, and seem to us to be founded on sound principles." "The question in all this class of cases," he says, "is first to arrive at the intention of the parties *inter sese*; and secondly, if between themselves there is no intention to create a partnership, whether there is any stubborn rule of law, which will nevertheless, as to third persons, make a mere participation in the profits conclusive that there is a partnership." "It is said, 'every man who has a share in the profits of a trade ought also to bear his share in the loss, as a partner.' In a just sense this language is sufficiently expressive of the general rule of law; but it is assuming the very point in controversy to assert that it is universally true, or that there are no qualifications, or limitations, or exceptions to it. On the contrary, the very cases alluded to by Lord Eldon, in the clearest terms establish that such qualifications, limitations, and exceptions do exist." Story on Part. sect. 36. "Admitting, however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties, in favor of third persons, in the absence of all other opposing circumstances; the question is whether the circumstances, under which the participation exists,

the rule above mentioned as settled; but we have not succeeded in finding in the English reports, previous cases or authorities which can be regarded as establishing this rule.

* It is sometimes difficult to distinguish between partnership and tenancy in common; and this question is often important as determining between the adverse rights of the creditors of the individual owners, and those of persons who claim as partnership creditors. In general, if the property owned jointly is so owned for the purpose of a joint business, and is so used, and the profits resulting form a common fund, it is partnership property; otherwise not. (x)

may not qualify the presumption, and satisfactorily prove that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, as a mere compensation for labor and services. If the latter be the true predicament of the party, and the whole transaction admits, nay requires, that very interpretation, where is the rule of law which forces upon the transaction the opposite interpretation, and requires the court to pronounce an agency to be a partnership, contrary to the truth of the facts, and the intention of the parties? Now it is precisely upon this very ground, that no such absolute rule exists, and that it is a mere presumption of law, which prevails in the absence of controlling circumstances, but is controlled by them, that the doctrine in the authorities alluded to is founded;" "and there is no hardship upon third persons, since the party does not hold himself out as more than an agent. This qualification of the rule (the rule itself being built upon an artificial foundation,) is in truth but carrying into effect the real intention of the parties, and would seem far more consonant to justice and equity than to enforce an opposite doctrine, which must always carry in its train serious mischiefs or ruinous results, never contemplated by the parties." sect. 38.

(x) *Post v. Kimberly*, 9 Johns. 470; *Murray v. Bogert*, 14 Johns. 318. Where the owners of land let it, agreeing with the occupiers to receive one half of the grain &c. in consideration of the occupancy, the owners and occupiers, together with other persons whom the occupiers admitted to a share in the

grain in consideration of their doing a portion of the farm work, were held to be tenants in common of the grain. *Putnam v. Wise*, 1 Hill, 234; *Caswell v. Districh*, 15 Wend. 379; *Walker v. Fitts*, 24 Pick. 191; *Frost v. Kellogg*, 23 Verm. 308; *Case v. Hart*, 11 Ohio 364; *Smyth v. Tankersley*, 20 Ala. 212. *Jackson v. Robinson*, 3 Mason, 138. A. and B. were tenants in common with C. and D. of a ship in certain proportions, and purchased a cargo, by an agreement, on their account in the like proportions for a voyage, and consigned the same to the master for sale and returns; it was held that they were tenants in common of the cargo, and not partners. *Story, J.* "It does not by any means follow because the purchase was made for the account of all, or the shipment was made in the names of all, that this constituted them partners in the sense of a joint interest. They might authorize a common agent to purchase or ship goods for them according to their several and separate interests, without involving themselves in a joint partnership responsibility. In my judgment there was no community of interest in the cargo, as partners. It appears from the admissions of the parties, as well as the proofs, that they never were, nor designed to be partners; and that they held their titles to undivided portions of the cargo, not as a common, but as a separate interest. They were, therefore, tenants in common of the cargo, having no general community of the profit and loss, but only a proportion according to their separate interests. If either had died, his share would not have survived to the others." *Harding*

SECTION VI.

OF THE RIGHT OF ACTION BETWEEN PARTNERS.

It is generally true that one partner cannot sue a copartner *at law* in respect to any matter growing out of the transactions of the partnership, and involving the examination of the partnership accounts; (*y*) because courts of law cannot do effectual justice to such questions and interests, and resort must be had to courts of equity. (*z*) But it is clear that a partner may sue a copartner on an *express* agreement, and

v. Foxcroft, 6 Greenl. 76. In this case it was held that the joint owners of a vessel, who agreed to send her on a foreign voyage for their mutual benefit—a part of the cargo being purchased by each separately, and a part by both jointly—were tenants in common of the property, and not partners; and that therefore a creditor of both owners, for cordage of the vessel, was not entitled to priority in payment, out of the vessel and cargo, against the separate creditors of either. *Mellen, C. J.*, said, "It is true, some parts of the cargo were purchased by the owners severally, and put on board, and some parts were purchased on joint account; but to constitute a partnership, persons must not only be jointly concerned in the purchase, but jointly concerned in the future sale." See *Thorndike v. De Wolf*, 6 Pick. 124. Where one party furnishes a boat and the other sails it, an agreement to divide the gross earnings does not constitute a partnership. *Bowman v. Bailey*, 10 Verm. 170.

(*y*) *Bovill v. Hammond*, 6 B. & C. 149; *Brown v. Tapscott*, 6 M. & W. 119; *Lawrence v. Clark*, 9 Dana, 257.

(*z*) It is clear that one partner has no right of action against a copartner for money or labor expended for the benefit of the concern. See *Goddard v. Hodges*, 1 Cr. & Mees. 37; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 B. & C. 419; *Fromont v. Coupland*, 2 Bing. 170; *Sadler v. Nixon*, 5 Barn. & Ad. 936; *Pearson v. Skelton*, 1 M. & W. 504; *Bevans v. Sullivan*, 4 Gill, 383. But one partner may maintain an action

for money had and received against the other partner, for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow*, 2 Term Rep. 476. And one partner may have an action against his copartner for not contributing his proportion towards the common stock. Thus, where A. agrees to supply B. with a manuscript work, to be printed by B., the profits of which are to be equally divided, B. may maintain an action against A. for refusing to supply the manuscript. This is not an action for partnership profits, but for refusing to contribute the labor of the defendant, towards the attainment of profits. *Gale v. Leckie*, 2 Starkie, 107. The same principle was adopted in *Elison v. Chapman*, 7 Blackf. 224. See also *Vance v. Blair*, 18 Ohio, 532.—The American courts fully recognize the doctrine that during the existence of a partnership, or even after its dissolution but before the business is wound up, and the final balance ascertained, no action at law will lie between partners. *Haskell v. Adams*, 7 Pick. 59; *Williams v. Henshaw*, 12 Pick. 378; *Fanning v. Chadwick*, 3 Pick. 420; *Causten v. Burke*, 2 Harr. & Gill, 295; *Chase v. Garvin*, 19 Maine, 211; *Kennedy v. McFadon*, 3 Harr. & Johns. 194; *Murray v. Bogert*, 14 Johns. 318; *Davenport v. Gear*, 2 Scam. 495. After such final balance is determined, and a promise by one partner to pay over, the other partner may sustain an action at law. *Gulick v. Gulick*, 2 Green, 578; *Byrd v. Fox*, 8 Missouri, 574. The promise may be only implied. *Wray v. Milestone*, 5 M. & W. 21.

perhaps on an *implied* agreement, to do any act not involving a consideration of the partnership accounts. (a) And if partners finally balance all their accounts, or a distinct part thereof is entirely severed by them from the rest, a suit at law is maintainable for the balance. (b)

If one of a partnership who are plaintiffs be also one of a partnership who are defendants, the action cannot be

(a) *Van Ness v. Forrest*, 8 Cranch, 30; *Gibson v. Moore*, 6 N. H. R. 547. In this case *Parker, J.*, thus states the principles applicable to this point. "Assumpsit may be maintained by one partner against another to recover a final balance upon the settlement of the partnership account, where there is an express promise to pay. *Casey v. Brush*, 2 Caines's Rep. 293; *Fromont v. Coupland*, 2 Bing. 170. In Massachusetts the court have held that where the partnership accounts are closed, and the balance struck, the law raises an implied promise. *Fanning v. Chadwick*, 3 Pick. 423. The same doctrine is found in *Rackstraw v. Imber*, Holt's N. P. R. 368. So where the judgment will be an entire termination of the partnership transactions, although there has been no settlement of the accounts by the partners, nor an express promise to pay, an action may be sustained. *Williams v. Henshaw*, 11 Pick. 82. Probably an action may be maintained by one partner against the other, for a balance due him out of the partnership transactions, if there be but a single item to liquidate. *Musier v. Trumpbour*, 5 Wendell, 274; 1 Stark. 78; *sed vide Bovill v. Hammond*, 6 B. & C. 149. The proposition that no action can be maintained at law, by one partner against the other, except to recover a final balance, must be taken with reference to the facts and questions arising in those cases in which such language is used. In *Smith v. Barrow*, 2 D. & E. 478, Mr. Justice *Buller* says, 'One partner cannot recover a sum of money received by the other, unless on a balance struck, that sum is found due to him alone.' Similar language is found in *Ozeas v. Johnston*, 1 Binney, 191; *Beach v. Hotchkiss*, 2 Conn. R. 425; *Murray v. Bogert*, 14 Johns. 318; *Westerlo v. Everton*, 1 Wend. 532. So in *Moravia v. Levy*, 2 D. & E. 483, note, an action was sustained for the amount

of a balance struck which the defendant had promised to pay. The articles contained a covenant to account at certain times, and it does not appear whether it was a final balance which was recovered. It is undoubtedly true as a general rule, that so long as the partnership continues, and the concerns of it remain unadjusted, the law will raise no implied promise by one to pay the other upon a partnership transaction. The reason is that such transactions create no debt or duty to pay. The act of one party is the act of the other—the payment or receipt of money by one is a payment or receipt by the other—and no cause of action can arise. In the present case there has been no balance struck. The settlement of the partnership concerns, generally, still remains to be made. But by agreement between the parties, in relation to a specific portion of the partnership transactions, a final adjustment has been made. If this accounting by means of the reference had only been for the purpose of ascertaining an item, in order to carry it into the partnership account between them, no doubt the general rule would apply. That was the case in *Fromont v. Coupland*, 2 Bing. 170. But such is not the fact here." See also *Clark v. Dibble*, 16 Wend. 601; *Grigsby v. Nance*, 3 Ala. 347.—And after a dissolution, an action will lie between partners to recover a balance due, on an implied promise. *Wilby v. Phinney*, 15 Mass. 116; *Pope v. Randolph*, 13 Ala. 214.—So to recover back money paid by mistake on an adjustment of the partnership concerns. *Bond v. Hays*, 12 Mass. 34; *Chase v. Garvin*, 19 Maine, 211.

(b) *Clark v. Dibble*, 16 Wend. 601; *Gibson v. Moore*, 6 N. H. R. 547; *McColl v. Oliver*, 1 Stew. 510; *Fanning v. Chadwick*, 3 Pick. 420; *Gulick v. Gulick*, 2 Green, 578.

maintained; for the same party cannot be plaintiff and defendant of record, in the same action. (c)

*SECTION VII.

OF THE SHARING OF LOSSES.

Though partnerships are usually formed by a participation of both profits and losses, it may be agreed that a partner shall have his share of the profits and not be liable for losses, and this agreement is valid as between the parties. And this agreement will be equally efficacious whether stated in articles, or proved by circumstances or otherwise. For the partners, *inter se*, may make what bargain they will. But no such agreement will prevent such partner from being liable for the debts of the partnership, unless the creditor knew of this bargain between the partners, and with this knowledge gave the credit to the other partners only. (d)

(c) *Portland Bank v. Hyde*, 2 Fairf. 196; *Tindal v. Bright*, Minor, 103; *Mainwaring v. Newman*, 2 B. & P. 120; *Neale v. Turton*, 4 Bing. 149; *Teague v. Hubbard*, 8 B. & C. 345; *Bosanquet v. Wray*, 6 Taunt. 597.—But see *Rose v. Poulton*, 2 Barn. & Ad. 822, where the facts were as follows—By an indenture between A., and B. and his wife, and C., of one part, and D. and E. and the same C., of another part, it was recited that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he F. giving sureties, namely, the said D., E. and C. for payment of an annuity to B.'s wife; and it was thereupon witnessed that in consideration of the covenants thereafter entered into by A., B. and his wife, and C., and of 10s., the said D., E., and C., and each and every of them, covenanted with A., B. and his wife, and C., to pay the annuity. There followed covenants by A., B. and his wife, and C., severally, for quiet enjoyment, and for executing an assignment to F. when required. The deed was signed and sealed by D., E., and C., and by F., but not by A. or B. In an action brought by A. and B., after

the death of C., for breach of the covenant to pay the annuity: *Held*, First, that the omission of A. and B. to execute the deed did not disable them from suing upon it; that such omission did not amount to a total failure of consideration for the covenant sued upon, (supposing such total failure to be an answer to the action,) and that the covenant to pay the annuity, and those for quiet enjoyment and for assigning, were not mutual and dependent. Secondly, that at least after C.'s death, A. and B. might sue D.'s executors (D. and E. being also dead) for non-payment of the annuity, though the covenant for such payment was entered into both by and to C.—And where one who is a member of two firms makes a note in the name of one of the firms, payable to a member of the other firm, the payee may sue and recover upon such note. *Moore v. Gano*, 12 Ohio, 300. See *Baring v. Lyman*, 1 Story, 396; *Banks v. Mitchell*, 8 Yerger, 111.

(d) See *Gilpin v. Enderbey*, 5 Barn. & Ald. 954; *Bond v. Pittard*, 3 Mees. & Welsb. 357. In this case, A. and B. carried on business together as solicitors in partnership, and held themselves out

SECTION VIII.

OF SECRET AND DORMANT PARTNERS.

A secret partner is one not openly and generally declared to be a partner, (e) and a dormant partner is strictly one who takes no share in the transaction or control of the partnership business; but it is often held to mean one whose name is not publicly mentioned; and the phrases secret partner and dormant partner are sometimes, but inaccurately, used as synonymous. (f) A dormant partner is liable when discovered. (g)

as such; and the defendant employed them in that capacity. By the agreement under which A. and B. entered into business together, B. was to receive annually out of the profits the sum of 300*l.*, but he was not to be in any manner liable to the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner: *Held*, that A. and B. were properly joined as plaintiffs in an action for work and labor, as the money, when recovered, would be the joint property of both until the accounts were ascertained and the division took place. In this case *Bolland*, B., said, "It has been fully established by numerous cases both at law and in equity, that third parties are not affected by the secret contracts, *inter se*, of persons holding themselves out and contracting as partners. That doctrine is fully gone into in the case of *Waugh v. Carver*, 2 H. Bl. 246, by Lord Chief Justice (Eyre) *De Grey*, and is there distinctly laid down." See *Perry v. Randolph*, 6 Sm. & Marsh. 335; *Hazard v. Hazard*, 1 Story, 374; *Barrett v. Swan*, 17 Maine, 180; *Pollard v. Stanton*, 7 Ala. 761; *Alderson v. Pope*, 1 Camp. 404, note; *Minnit v. Whinery*, 5 Bro. P. C. 489. See also *Brown v. Leonard*, 2 Chitty, 120.

(e) In *United States Bank v. Binney*, 5 Mason, 186, the following definition of a secret partnership is given: "I understand the common meaning of *secret* partnership to be a partnership where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Where

all the partners are publicly made known, whether it be by one or all the partners, it is no longer a secret partnership." See S. C. 5 Peters, 529.

(f) In *Mitchell v. Dall*, 2 Harr. & Gill, 159, it is said that in the legal acceptance of the term *dormant*, as applied to partners in trade, every partner is considered dormant, unless his name is mentioned in the firm, or embraced under general terms in the name of the firm or company. See to the same effect *Kelley v. Hurlburt*, 5 Cowen, 534; *Desha v. Holland*, 12 Ala. 513.—The law relative to dormant partners seems to be confined to trade and commerce, and does not extend to speculations in the sale and purchase of land. *Pitts v. Waugh*, 4 Mass. 424; *Smith v. Burnham*, 3 Sumner, 470. But see *Brooke v. Washington*, 8 Grattan, 248, *contra*.

(g) *Robinson v. Wilkinson*, 3 Price, 538. In this case Wilkinson had been a dormant partner in a ship with one Cay, but had retired. Robinson, the plaintiff, supplied the ship and the captain with stores and cash on account of the ship, to the amount of £1,000 and upwards. The amount of the debt at the time of Wilkinson's retirement was £401 16s. 1d. Cay having become insolvent, the Court of Exchequer held clearly that Robinson was entitled to recover against Wilkinson the total sum of £401 16s. 1d., (with a trifling deduction on a particular account,) although, when the goods were supplied, Robinson had no knowledge that Wilkinson was a partner. "A party," said *Graham*, B., "has always a right against a concealed partner of whom he has previous-

But not for a debt contracted after he has retired, provided the creditor never knew that he was a partner, or did know that he had retired before credit was given to the partnership. (*h*)

*SECTION IX.

OF RETIRING PARTNERS.

A retiring partner who receives thereafter a share of the profits is still liable; but not if he receives an annuity or definite sum no ways dependent on the profits. Though the remaining partners may look to the partnership fund or to their expected profits as the means of paying such annuity, it is still only their debt to him, and does not involve him in their responsibility to others. (*i*)

ly had no knowledge, as soon as he discovers him, unless that ignorance were his own fault; as, if he had not used due diligence in finding him."—The liability of a dormant partner to creditors may be avoided, however, by proof of fraud in the formation of the partnership, if such dormant partner has received no share of the funds. *Mason v. Connell*, 1 Wharton, 381.

(*h*) *Grosvenor v. Lloyd*, 1 Metc. 19. In this case, *Shaw, C. J.*, observed, "A dormant partner is liable for debts contracted while he is a partner, not because credit is given to him, but because he is in fact a contracting party, taking part of the profits of such contracts. But when he ceases to be in fact a partner, the reason ceases, and he is no longer liable. He is not liable as a contracting party, because the partnership name, under which the remaining partners continue to transact business, no longer includes him, though that name may remain the same; and he is not liable as holding out a false credit for the firm, because the case supposes that he is not known as a partner, and therefore the firm derives no credit whilst he remains a secret or dormant partner. No customer, therefore, or other person dealing with the firm can be disappointed in any just expectations, if he silently withdraws from the firm. A very dif-

ferent rule would apply where one had been a known or ostensible partner, and held himself out as such." See also *Kelly v. Hurlburt*, 5 Cowen, 534; *Evans v. Drummond*, 4 Esp. 89; *Armstrong v. Hussey*, 12 Serg. & Rawle, 315; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Benton v. Chamberlain*, 23 Verm. 711; *Edwards v. McFall*, 5 Louis. Ann. 167; *Brooke v. Enderby*, 2 Brod. & Bing. 71; *Carter v. Whalley*, 1 Barn. & Ad. 11.—It is a question for the jury whether a person was a dormant partner, and his interest not in fact generally known, so as to excuse notice of his retirement from the firm. *Shaw, C. J.*, in *Godard v. Pratt*, 16 Pick. 429.

(*i*) See *Young v. Axtell*, 2 H. Bl. 242; *Holyland v. De Mendez*, 3 Mer. 184. There it was agreed on the dissolution of a partnership, that the continuing partner should, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, "or in case he should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own." The continuing partner obtained a renewal of the lease, and afterwards be-

When a partner retires from a firm, notice is usually given by public advertisement, or by letters to the customers of the *firm, or both. A party having such notice cannot hold the retiring partner to a responsibility for a credit given to the firm after such retirement and notice. (*j*) It also seems to

came bankrupt, and the renewed lease passed under the assignment of his estate. It was held, that this was not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. Under the same circumstances, namely, of a partner retiring and leaving his capital in the firm, it will be necessarily unsafe to reserve a usurious rate of interest for the capital left in the firm; though this observation, perhaps, only applies to a usurious agreement in the deed of dissolution itself. For where, by a deed of dissolution between A., B., and C., A. and B. covenanted to replace C.'s share of the capital by instalments, and afterwards a new agreement was entered into by parol, which secured a usurious rate of interest to C., it was held that the effect of considering the latter agreement void, was, not to invalidate, but to set up the original agreement and make that binding on the parties, for that the second agreement was not a performance of, but a substitution for, the former transaction. See *Parker v. Ramsbottom*, 3 B. & C. 257.

(*j*) Notice of the withdrawal of a dormant partner is not necessary. *Magill v. Merrie*, 5 B. Monr. 168; *Kennedy v. Bohannon*, 11 B. Mon. 120; *Scott v. Colmesnil*, 7 J. J. Marsh. 416.— But it is otherwise as to ostensible partners. To affect a creditor who has formerly traded with the firm, the notice of the retirement of an ostensible partner must be proved to have been actual. *Prentiss v. Sinclair*, 5 Verm. 149; *Simonds v. Strong*, 24 Verm. 642; *Wardwell v. Haight*, 2 Barb. Sup. Ct. R. 549; *Hutchins v. Hudson*, 8 Humph. 426; *Graves v. Merry*, 6 Cowen, 705; *Vernon v. Manhattan Company*, 17 Wend. 527. In *Pitcher v. Barrows*, 17 Pick. 365, *Shaw, C. J.*, said, "It has sometimes been held that those who have been dealers and customers of a firm shall have actual notice of a dissolution; but," he adds, "that may be thought too strict. But it has always been held, that in default of actual and personal notice

to a party, public notice in some newspaper shall be deemed necessary." "The doctrine," says Mr. Chancellor *Kent*, "seems to be that merely taking a newspaper in which a notice is contained is not sufficient to charge a party, for it is not to be intended that he reads the contents of all the notices in the newspapers which he may chance to take. The inference of constructive notice from such a source was strongly exploded in some of the above cases." (3 *Kent*, 5th ed. 67, note.) *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482. But see *Jenkins v. Blizard*, 1 Stark. 418. A newspaper notice accidentally reaching a bank director is not equivalent to actual notice to the bank; but it seems it would be, if the notice was actually served on him, with directions to communicate it to the board. *National Bank v. Norton*, 1 Hill (N. Y.) 572.— Publication of the dissolution in a newspaper will not *per se* be sufficient, although it may with other circumstances go to the jury as evidence of actual notice. See *Graham v. Hope*, 1 Peake, 154; *White v. Murphy*, 3 Rich. 369; *Hutchins v. Bank of Tennessee*, 8 Hump. 418; *Shurlds v. Tilson*, 2 McLean, 458; *Grinnan v. Baton Rouge Mills Co.*, 7 Louis. Ann. 638. As to all persons who have had no dealings, and given no credit to the firm, publication of the dissolution is sufficient. *Lansing v. Gaine*, 2 Johns. 300; *Prentiss v. Sinclair*, 5 Verm. 149; *Shurlds v. Tilson*, 2 McLean, 458; *Watkinson v. Bank of Pennsylvania*, 4 Wharton, 482. In *Mowatt v. Howland*, 3 Day, 353, two partners of a firm resided in New York, and the third in Norwich, in Connecticut, their usual place of doing business. Upon dissolution, notice was given, for several weeks successively, in two newspapers, one printed at Norwich, and the other at New London, in the vicinity of Norwich. One of the New York partners afterwards indorsed a bill of exchange in New York with the company name, but whether the indorsee had or had not actual notice of the dissolution, did not

be settled that such retiring partner is not held to a creditor who has no knowledge of such retirement, provided the retirement was actual and in good faith, and the retiring partner did all that was usual or proper to give the public and customers notice of his retirement. But if the retiring partner gives no such notice, then a customer of the firm accustomed to trade with the firm on the responsibility of all the partners, including him who has retired, and not knowing of his retirement, may hold him for a debt contracted with the firm after his retirement. (*k*) Whether a *new* customer can *so hold him is not so certain. Generally, he cannot; but if the new customer was brought to the firm by the responsibility of this partner, which responsibility he knew to have existed, and had a right to suppose existed still, which right grew out of the laches of the retiring partner, and no negligence or want of diligence was imputable to the creditor, it would seem on general principles that the creditor had a right to hold him responsible as a partner. It would be difficult to distinguish on principle such a case from that of a former customer creating a new debt.

SECTION X.

OF NOMINAL PARTNERS.

A nominal partner, or one held out to the world as such without actual participation of profit and loss, is of course held, generally, as responsible for the debts of the partnership.

appear, nor did it appear that he had ever been a correspondent of the company. It was held, that these facts constituted reasonable notice to him, and to every person not a correspondent of the company.

(*k*) *Parkin v. Carruthers*, 3 Esp. 248; *Graham v. Hope*, 1 Peake, 154; *Bernard v. Torrance*, 5 Gill & Johns. 383; *Lucas v. Bank of Darien*, 2 Stew. 280; *Stables v. Eley*, 1 Carr. & Payne, 614; *Taylor v. Young*, 3 Watts, 339; *Amidown v. Osgood*, 24 Verm. 278; *Simonds v. Strong*, 24 Verm. 642; *Burgan v. Lyell*, 2 Mich. 102. And a partner whose name is not used in a firm, is

still liable for debts contracted subsequently to his retirement, with persons who knew of his previous connection, but who had no notice of his retirement. *Davis v. Allen*, 3 Comst. 168.

The principle upon which this responsibility proceeds, is the negligence of the partners in leaving the world in ignorance of the fact of dissolution, and leaving strangers to conclude that the partnership is continued, and to bestow faith and confidence on the partnership name in consequence of that belief. See 3 Kent's Com. 66; *Princeton v. Gulick*, 1 Harrison, 161.

But it has been determined that where two or more persons appear to the public as partners, and there is a stipulation between them, that one of them shall not have any share of the profits, nor pay any portion of the losses, he is not liable to the creditor of the firm who before giving credit knew of this stipulation; because such creditor has no right to fix upon him a responsibility against his bargain and intention, which bargain and intention were known to the creditor. (l) An admission by a person that he is a partner in a firm is not conclusive against him, though made to the creditor, if made *after* the debt for which it is sought to make him liable, was contracted; otherwise, if made *before* the credit is given. (m)

(l) *Alderson v. Pope*, 1 Camp. 404, note, and *Lord Ellenborough* in that case held that notice to one member of a firm, of such a stipulation, was notice to the whole partnership. It was also held in *Batty v. McCundie*, 3 Carr. & Payne, 202, that if one of several partners be concerned in preparing the prospectus of a projected newspaper, which prospectus states that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and such partner be also aware, that a particular individual is to be sole nominal proprietor; the firm of which such a partner is a member, (although he has not taken any share in the paper,) cannot sue the subscribers who have taken shares, for the price of goods furnished for the paper. See also *Burness v. Pennell*, 2 Ho. of Lords Cases, 497.

(m) *Ridgway v. Philip*, 1 Cr. Mee. & Ros. 415. In this case, the plaintiff contracted with one Brown, the patentee of a draining machine, for the erection of one of those machines on the plaintiff's lands in Cambridgeshire. The draft of the agreement being drawn up in the name of Brown & Co., the plaintiff asked Brown what other persons besides himself composed the firm, upon which Brown wrote on the back of the draft, "John Broadhurst, Esq., and Dr. Wilson Philip." The contract being broken, the plaintiff brought his action against Philip and Broadhurst; but previously to the action, his son called on the defendant Broadhurst, and asked

him whether Brown was correct in making the indorsement upon the draft of the agreement, to which Broadhurst replied in the affirmative and stated that he had bought his original interest from the other defendant, Dr. Philip. Evidence was also given at the trial, that while the engine was in progress, he attended very frequently at the manufactory to inquire how it was going on, and that he gave advice and made suggestions with regard to its construction. In answer to this, an agreement or license from Brown and the other parties interested in the patent, to Broadhurst, was given in evidence on the part of the latter, authorizing Broadhurst to use the patent for the erection of engines in certain parts of Cornwall only, and it was contended that the admissions of Broadhurst were to be taken with reference to the interest which he thus possessed in the invention, and not to any participation either in the patent generally, or in the particular transaction in question. *Gaselee, J.*, who tried the action, left it to the jury to say whether Broadhurst, at the time he made the admission, was under a mistake; and whether the acts he was proved to have done did or did not afford a sufficient ground for supposing it to be a mistake; and with regard to those acts, he left it to the jury to say whether they were referable to a partnership in the patent in general, or in this particular transaction. The jury found a verdict for the defendants, on the ground that Broadhurst was not a partner, and the Court of Exchequer refused to grant a new trial.

SECTION XI.

WHEN A JOINT LIABILITY IS INCURRED.

Where there is no joint purchase or joint incurring of debt, but a purchase by one to whom alone credit is given, a subsequent joint interest in the property purchased, and in the business and profits depending upon it, carries no liability for the original debt. (*n*) And where many persons join in an adventure, each to contribute his share, each is liable alone for his share to the person from whom he bought it. No partnership arises until the several shares are brought together and mixed up in one common adventure. (*o*) But if the bar-

(*n*) Persons are not to be held jointly liable upon a contract as partners, unless they have a joint interest existing at the time of the formation of the contract. The case of *Young v. Hunter*, 4 Taunton, 582, well illustrates this principle. In an action for goods sold and delivered, two of the defendants, Hunter and Rayney, suffered judgment to go by default; the other defendants, Hoffham & Co., pleaded the general issue. On trial it appeared that Hunter and Rayney had bought goods of the plaintiffs and others, which they intended to ship for the Baltic, and the defendants Hoffham & Co. (not otherwise partners of Hunter & Co.) were afterwards allowed to join in the adventure, and to have a fifth share upon the goods being put on board. The plaintiffs knew nothing of Hoffham & Co., but sold the goods to Hunter & Co. only. The question was whether this was a case of common sleeping partners. *Mansfield*, C. J., directed the jury to find for defendant, with liberty for plaintiff, to move for a new trial; a rule *nisi* was obtained on the ground that Hoffham & Co. having had the benefit of the goods, were liable to pay for them, though they were originally furnished to Hunter & Co. only. On a new trial, *Mansfield*, C. J., continued of the same opinion. *Heath*, J. "The proposition of the plaintiff's counsel that if it be shown that at any one period of the transaction there was a partnership subsisting, it was therefore to be inferred

that there had been a partnership in the particular original purchase, is wholly unfounded." *Chambre*, J., was of the same opinion. *Gibbs*, J., "The only possible ground for a new trial would be, if the plaintiffs could show that at the time of the purchase of the goods from the plaintiffs, Hoffham & Co. and Hunter & Rayney were concerned in that purchase on their joint account. It only appears that they were so interested at the time of shipment. It is not to be inferred from the fact that Hoffham & Co. were interested at the time of shipment, that they were interested at the time of the purchase. It is for the plaintiffs to make it out by evidence. If parties agree among themselves that one house shall buy goods, and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, though such other person would have the benefit of the goods. On this and other reasons, I think the present verdict ought not to be disturbed."—This principle is further illustrated by many cases, showing that where one on his individual credit alone borrows money for the use of the firm the firm will not be liable merely because the money came to their use. See *Siffkin v. Walker*, 2 Camp. 308; *Graeff v. Hitchman*, 5 Watts, 454; *Emly v. Lye*, 15 East, 7; *Green v. Tanner*, 8 Metc. 411; *Ripley v. Kingsbury*, 1 Day, 150, note.

(*o*) This principle is fully esta-

*gain was for a joint purchase and joint adventure, there is at once a joint liability for the original purchase, although it was *made by one of the partners alone, and he alone was known *to be interested, and credit was given to him alone. (p) Because the liability of a partner springs *either* from his holding himself out to the world as a partner, *or* from his participation in the business and its profit or loss. If these two causes meet, as is usually the case, they

blished by the case of *Saville v. Robertson*, 4 Term R. 720. See also *Gouthwaite v. Duckworth*, 12 East, 421, where *Saville v. Robertson* is distinguished. Lord *Ellenborough*, in *Gouthwaite v. Duckworth*, says:—"The case of *Saville v. Robertson* does indeed approach very near to this; but the distinction is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure, on board the ship; and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased in pursuance of the agreement for the adventure, of which it had been before settled that *Duckworth* was to have a moiety." And Mr. Justice *Bayley* observed, that, "in *Saville v. Robertson*, after the purchase of the goods made by the several adventurers, there was a still further act to be done, which was the putting them on board the ship in which they had a common concern, for the joint adventure; and until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant, by virtue of the previous agreement."—See also *Post v. Kimberly*, 9 Johns. 470, in which it was held, that there was no partnership between A. and B., and C. and D., in the outward cargo, except, perhaps, so far as related to the transport and selling of it; for that, although the whole cargo was shipped on board the same vessel, yet it was clear that each house purchased and put on board its aliquot part, without the concern or responsibility of the other.—*Brooke v. Evans*, 5 Watts, 196; *Simms v. Willing*, 8 Serg. & Rawle, 103.

(p) Thus, where three persons were engaged in a joint speculation, for the purchase and importation of corn, but

no partnership fund was raised for the speculation, and the parties met the expenses in thirds, and two only of the three had the management of the speculation, one of these two being the consignee and the other the salesman of the corn; it was nevertheless very truly said, that, if there had been a claim in that case by the seller of the corn, no doubt he would have been entitled to proceed against all the parties, and might have called on them all for payment. *Smith v. Craven*, 1 Crompt. & Jerv. 500. Upon the same principles, where A. and others agreed to become partners in the purchase of fifteen shares of a copper adventure, and in pursuance of the agreement, A. alone, and in his own name, contracted for the purchase of the shares, and paid a deposit, to which the others contributed; it was held that the others, as well as A., were bound by this contract, and that, upon an action and verdict against A. for the non-performance of it, the others were bound to contribute their proportion of the damages and costs. *Browne v. Gibbins*, 5 Bro. P. C. 491. So, where A. and B., publishers, ordered certain stationers, to supply paper to C. and D., printers, for the purpose of printing certain specified works, and, upon the bankruptcy of A. and B., the stationers discovered that C. and D. were partners with A. and B. in the publication of those works, and thereupon brought an action against C. & D., to recover the value of the paper, Lord *Denman*, C. J., told the jury that if they thought that, at the time when the goods were furnished, the defendants were partners in the concern for whose benefit they were furnished, the jury were to find for the plaintiffs. The jury did so find, and the court of King's Bench refused to grant a new trial. *Gardiner v. Childs*, 8 Carr. & P. 345.—See *Coope v. Eyre*, 1 H. Bl. 37; *Barton v. Han-*

strengthen each other; but either of them alone is, in general, sufficient to create this liability. (*q*) And there is no liability as a partner where there is neither a participation of profits, nor any such use of the defendant's name permitted by him as justifies the plaintiff in selling to others on his credit, although there may be in some other way or measure a community of interest. (*r*)

*SECTION XII.

OF THE AUTHORITY OF EACH PARTNER.

It is a general rule, both throughout Europe and in this country, that the whole firm and all the members of a copartnership are bound by the acts and contracts of one partner with reference to the partnership business and affairs — such act or contract being in law the act or contract of all. This power of each partner to represent and to bind the rest, and to dispose of the partnership property, is sometimes regarded as arising from the agency which all confer on each; and sometimes from the community of interest whereby no partner owns any part of the partnership property exclusively of the rest, but each partner owns the whole, in common with all the others. We think it rests upon both of these foundations together. It is true that there may be a copartnership where one or more of the partners has no interest in the capital stock by agreement among themselves. But even then all own together the profits, and so much of the funds or capital of the firm as consists of profits. Partners are undoubtedly, in some way, agents of each other. But the principle of agency alone will not explain the whole law of their mutual responsibility. Out of the combination of this principle with those which grow out of the community of property and of

son, 2 Taunt. 49; *Sims v. Willing*, 8 Serg. & Rawle, 103.

(*q*) See *Buckingham v. Burgess*, 3 McLean, 364; *Markham v. Jones*, 7 B. Monroe, 456; *Benedict v. Davis*, 2 McLean, 347; *Cottrill v. Vanduzen*, 22 Verm. 511.

(*r*) See *Osborne v. Brennan*, 2 Nott &

McCord, 427; *Milburn v. Gayther*, 8 Gill, 92. — And a lay or share in the proceeds of a whaling voyage does not create a partnership in the profits of the voyage, but is in the nature of seamen's wages, and governed by the same rules. *Coffin v. Jenkins*, 3 Story, 108.

interest, the law of partnership is formed. And this law may often be illustrated by a reference to the principles of agency; but must still be regarded as consisting of a distinct system of rules and principles peculiar to itself.

So also partnership is sometimes spoken of as like joint-tenancy, with important modifications, or like tenancy in common, with such modifications. In truth it is a distinct and independent relation; and though it has some of the attributes of joint-tenancy, and some of tenancy in common, it is neither of these. Nor can it be much better illustrated by a reference to either of these modes of joint ownership, than they would be by a reference to partnership.

*If an action is brought against sundry persons as copartners, and the fact of copartnership is admitted, or otherwise proved, then the admission of one of the partners as to any matter between the firm and another party affects as evidence all the partners. But where the existence of the copartnership, or of the joint interest or liability, is in dispute, the admission of one person that he is copartner with the others, affects him alone, and is not evidence of the existence of the copartnership so as to bind the others. (s) And if two firms are partners in any transaction, the acknowledgment by one affects both. The effect of an acknowledgment by a partner,

(s) *Taylor v. Henderson*, 17 S. & Rawle, 453; *McPherson v. Rathbone*, 7 Wend. 216; *Jewett v. Stevens*, 6 N. H. 82. *Mitchell v. Roulstone*, 2 Hale, 551. *Nelson v. Lloyd*, 9 Watts, 22; *Cottrill v. Vanduzen*, 22 Verm. 511; *Gilpin v. Temple*, 4 Harring. 190; *Van Reimsdyk v. Kane*, 1 Gallison, 630; *Tuttle v. Cooper*, 5 Pick. 414; *Whitney v. Ferris*, 10 Johns. 66; *Bucknam v. Barnum*, 15 Conn. 68; *Phillips v. Purington*, 15 Maine, 425; *Jennings v. Estes*, 16 Maine, 323; *Welsh v. Speakman*, 8 Watts & Serg. 257; *Haughey v. Strickler*, 2 Watts & Serg. 411; *Porter v. Wilson*, 13 Penn. 641.—But the existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, and conduct of the parties, the act of one, the declarations of another, and the acknowledgment or conduct of a third. *Welsh v. Speakman*, 8 Watts & Serg. 257. See

also *Haughey v. Strickler*, 2 Watts & Serg. 411.—And where proof of the admissions of an alleged partner are offered at the trial, it is the province of the judge and not of the jury to pass upon the fact whether such person was a partner or not. *Harris v. Wilson*, 7 Wend. 57.—And where the terms of the agreement and the facts are admitted, it is a question of law whether there was a partnership or not. *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McCord, 20.—The fact that the defendants do business as partners, is *prima facie* evidence of their copartnership, and no written articles need be shown. *Bryer v. Weston*, 16 Maine, 261; *Gilbert v. Whidden*, 20 Maine, 367; *Forbes v. Davison*, 11 Verm. 660. And the adverse party's acknowledgment that the plaintiffs were partners is sufficient. *Bisel v. Hobbs*, 6 Blackf. 479.

where a promise is barred by the Statute of Limitations, will be considered when we treat of that statute.

Where a joint business transaction consists in or refers to the purchase of goods, it is generally the rule that the partnership liability begins when the goods are ordered. But this may depend upon the question whether the person giving the order was, at that time, the agent of all who are sought to be charged. For if he was not, then they are not liable; and in that case a subsequent naked acknowledgment of the contract will not suffice to render them liable as partners. (*t*) For parties

(*t*) *Gouthwaite v. Duckworth*, 12 East, 421; *Saville v. Robertson*, 4 Term Rep. 720. In *Sims v. Willing*, 8 Serg. & Rawle, 103, A., by order of B., chartered a vessel to take a cargo of flour and Indian corn on freight from Philadelphia to Lisbon. Part of the flour belonged to A., part to B., and the remainder to C.; and the share of each was paid for out of his separate funds. A. effected a separate insurance on his own interest in the flour. The whole shipment was consigned to C. in Lisbon, and the whole appeared as his property for the purpose of protecting it from British cruisers. Had the vessel arrived at Lisbon, the whole of the flour was to have been sold by the consignee, and the net proceeds of A.'s interest remitted, on his account, to his correspondent in London. *Held*, that A., B., and C. were partners, and individually liable for the whole amount of a general average due upon the flour. — The case of *Post v. Kimberly*, 9 Johns. 470, is a leading case on this subject. In that case, A. and M., partners, owned three fourths of a vessel, and B. and K., partners, owned the one fourth; they agreed to fit her out on a voyage from New York to Lagaira. A. and M. purchased three fourths of the cargo, and chiefly, if not wholly, with notes lent and advanced to them by P. and R., commission merchants. B. and K. purchased the other fourth of the cargo, for which they paid their own money, and shipped the same on board the vessel; but it was not distinguished from the rest of the cargo by any particular marks; and the whole cargo was to be sold at Lagaira, for the joint account and joint benefit of the owners, A. and M., and B. and K. M. went

out as the supercargo and agent; and having sold the cargo at Lagaira, he invested the proceeds in a return cargo, with which the vessel set sail for New York, but was obliged by stress of weather to put into Norfolk, where M. sold the return cargo, except a small parcel of coffee, and for the avails received bills of exchange, which he indorsed and remitted, with the parcel of coffee, to P. and R., to whom A. and M. were jointly indebted, and M. on his private account, to a greater amount, for advances made at the time of the purchase of the outward cargo. P. and R. collected the bills and sold the coffee so remitted, and applied the same to the payment of the debts so due to them from A. and M. P. and R. had notice, if not at the time of the shipment of the outward cargo, certainly before the bills remitted by M. were collected, and the coffee sold and converted into money, that B. and K. were interested in and owned *one fourth* of the cargo, so sold by M.; and B. and K. demanded of P. and R. their proportion of the proceeds so remitted by M., after deducting commissions, &c., but P. and R. refused to pay or deliver the same, alleging their right to retain the same, for the payment of the debt due to them from A. and M. It was held, that there was no *partnership* existing between A. and M. and B. and K., so as to render the disposition of the return cargo, by M. binding, as the act of a partner, on B. and K.; that there was no agreement constituting a partnership in the purchase of the outward cargo, or to share jointly in the *ultimate* profit and loss of the adventure; and though there might be a partnership, so

*are not jointly liable as partners upon any contract, unless they had a joint interest preceding or contemporary with the *formation of the contract. But where two or more agree together to purchase goods, and agree also that one shall purchase them for the rest, here there is a partnership preceding the purchase, and he that buys is by the agreement of the others their agent, and all are liable as partners. (u)

We have seen that each partner is for many purposes the agent of all the rest, by force of law, without any express authority. Loans, purchases, sales, assignments, pledges, or mortgages, effected by one partner on the partnership account, and with good faith on the part of the creditor or other third party, are binding on all the firm. And this agency, as it generally springs from a community of interest, so it is generally limited by this community.

Among the questions which have arisen as to the limitations to this general power, one, not yet perhaps perfectly settled, is as to the power of one partner to make an assignment of the whole property, to pay the partnership debts. (v) We think

far as respected the transportation and selling of the outward cargo, for the joint profit and loss of the owners; yet it terminated in the sale of the outward cargo; and their interest in the return cargo was separate and distinct, each being entitled to his respective proportion of it, without any concern in the profit and loss, which might ultimately arise; and that P. and R. not having received the bills in the course of trade, and knowing of the interest of B. and K. before the bills were paid, had no right to retain their share, for the payment of the debt of A. and M., but must account to B. & K., for their proportion; and that a bill for a discovery and account by them, against P. and R., was sustainable in the Court of Chancery; that court having a concurrent jurisdiction with the courts of law in all matters of account.—In *Coope v. Eyre*, 1 H. Bl. 37, A., B., C., and D. agreed to buy jointly all the oil they could get, as their joint purchase, but A. alone was to buy, and B., C., and D. were to share equally in the oil he bought. A. buys of E. F. on credit. The oil falls in value, and A. fails. E.

F. sues B., C., and D. as his partners. They were held not to be his partners, because it appeared that A. was not to sell for the rest; but when he had bought, B., C., and D. were to receive from him each one fourth; and there was no community in the disposition of the oil.—A firm can not be charged with a debt contracted by one of the partners before the partnership was constituted, although the subject-matter which was the consideration of the debt, has been carried into the partnership as stock. *Brooke v. Evans*, 5 Watts, 196; *Ketchum v. Durkee*, 1 Hoff. Ch. R. 538. (u) *Felichy v. Hamilton*, 1 Wash. C. C. R. 491.

(v) *Anderson v. Tompkins*, 1 Brock. 456. It was held in this case that the right of one partner to bind another by such assignment results from his general power to dispose of the partnership property, and if made *bonâ fide* is valid. *Marshall, C. J.*, said, "Had this, then been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the

the weight of authority and of reason is in favor of this power, and that such assignment, being entirely in good faith, would

transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one. The *quantum* of debt, or of goods sold, cannot alter the right. Neither does it, as I conceive, affect the power, that these goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees, for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act be justified by its motives, if the mode of sale be such as the circumstances require, I cannot say that the partner has exceeded his power." The assignment was also held valid in *Harrison v. Sterry*, 5 Cranch, 300, although under seal. *Robinson v. Crowder*, 4 McCord, 519. And see to the same effect *Mills v. Barber*, 4 Day, 428; *Deckard v. Case*, 5 Watts, 22; *Tapley v. Butterfield*, 1 Met. 515. In *Egberts v. Wood*, 3 Paige, 517, Chancellor *Walworth* considered such assignments valid when not against the known wishes of a copartner. The contrary was held in *Dickinson v. Legare*, 1 Desau. 537 (overruled by *Robinson v. Crowder*, *supra*); *Dana v. Lull*, 17 Verm. 390. Per *Redfield, J.*, and *Bennett, J.* See *Moddewell v. Keever*, 8 W. & S. 63. In *Havens v. Hussey*, 5 Paige, 30, the power of one partner to make such an assignment against the known wishes of a copartner, or without his consent, was held invalid. Chancellor *Walworth*, referring to *Egberts v. Wood*, *supra*, said, "As it was not necessary for the decision of that case, I did not express any opinion as to the validity of an assignment of the partnership effects by one partner, against the known wishes of his copartner, to a trustee, for the benefit of the favorite creditors of the assignor; in fraud of the rights of his copartner to participate in the distribution of the partnership effects among the creditors, or in the decision of the question as to which of the creditors, if any, should have a preference in payment out of the effects of an insolvent concern. . . . One member of the firm, without any

express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any other of the copartnership effects; although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the copartnership; as it renders it impossible for the firm to continue its business."—In *Hitchcock v. St. John*, 1 Hoff. Ch. 511, it was held, that one partner cannot on the eve of insolvency assign all the partnership property to a trustee, for the purpose of paying the debts of the firm with preferences. In *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477, the reasons for and against the validity of such assignments to trustees were elaborately considered by *Felch, J.*, delivering the opinion of the court, and *Whipple* dissenting; and it was held that the implied authority arising from the ordinary contract of copartnership does not authorize one of the partners, without the assent of his copartners, and in the absence of special circumstances, as their absence in a foreign country, to make a general assignment of the partnership effects, to a trustee, for the benefit of creditors, giving preferences to some over others. The power of one partner to make such an assignment to trustees as would terminate the partnership was left undecided in *Hayes v. Heyer*, 4 Sandf. Ch. 485, and *Pierpoint v. Graham*, 4 Wash. C. C. 232. In the latter case Judge *Washington* evidently inclined to the opinion that it does not exist, although he did not find it necessary to express himself decidedly upon the question. See *Collyer* on Part. § 395; *Story* on Part. § 101, 310; 3 Kent, Comm. 44, note, (7th ed.) But the assignment of real property to trustees will not bind the partners who do not join in it. *Anderson v. Tompkins*, 1 Brock. 463; *Collyer* on Part. (3d Am. ed.) § 394.

be held valid. He may sell the whole stock in *trade by a single contract. (w) Nor is the sale avoided by the fact that the partner making the sale applies the proceeds to the payment of his private debt. (x)

It seems to be settled that a partner may dissent from a future or incomplete contract, and that a third party having notice of such dissent could not hold the dissenting partner, without evidence of his subsequent assent or ratification. (y)

(w) *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson v. Tompkins*, 1 Brock. 456; *Pierson v. Hooker*, 3 Johns. 70; *Livingston v. Roosevelt*, 4 Johns. 277; *Mills v. Barber*, 4 Day, 430; *Pierpoint v. Graham*, 4 Wash. C. C. 234; *Kirby v. Ingersoll*, 1 Harring. Ch. (Mich.) 172; *Halstead v. Shepard*, 23 Ala. 558. In *Whitton v. Smith*, 1 Freeman, Ch. (Miss.) 238, *Buckner, C. J.*, says, "One of the undisputed canons of the law of partnership is, the right of each partner to sell the whole partnership property, if the sale be free from fraud on the part of the purchaser, and such a sale terminates the partnership relation." *Arnold v. Brown*, 24 Pick. 92. *Morton, J.* "The sale was made by one of two partners. And the first objection is, that one, in the absence of the other, had no authority to make this sale. It is said, that although he might sell the whole partnership stock by retail, yet that it was not according to the ordinary course of business, and so not within the scope of his authority, to sell the whole at once by a single contract. We have no evidence of the terms of association between these partners; but there is no reason to suppose that either member of the firm had any different authority than what was derived from the relation subsisting between them. Doubtless the ordinary business of the company was to purchase goods by the large quantity, and to sell them in small quantities. But this cannot restrain the general power to buy and sell. The validity of a purchase or a sale cannot be made to depend upon the amount bought and sold. The authority will expand or contract, according to the emergencies which may arise in the course of their proper business. One of their principal objects was to sell, and it would be absurd to say that either

partner might sell all the goods by retail as fast as possible, but if a favorable opportunity occurred, to sell a great part or the whole at once, he would have no power to do it. That an exigency had arisen in the affairs of the partnership, which rendered a sale necessary, and which made it highly expedient and beneficial to sell in this mode, is very apparent. And we have no doubt that the one partner was authorized to make this sale in the name of the firm."

(x) *Arnold v. Brown*, 24 Pick. 93. *Morton, J.* "It was immaterial to the purchaser how or to whom he paid the price. If a portion went to pay a private debt of one of the firm, it would not invalidate the sale and defeat the transfer of the goods. Whether it would be deemed a legal payment *pro tanto*, as against the creditors of the firm, is a question with which we have nothing to do. So if the partnership stock had been taken in satisfaction of a private debt due from one of the partners to the purchaser, it might have been deemed fraudulent as to the creditors of the company. But such was not this case."

(y) In *Willis v. Dyson*, 1 Stark. 164, the dissent was by one partner, who sent a circular containing these words: "I am sorry that the conduct of my partner compels me to send the annexed circular. I recommend it to you to be in possession of my individual signature before you send any more goods;" and it was held to be sufficient. Lord *Ellenborough* held, "that although no dissolution had taken place till a late period, yet that after notice by one partner not to supply any more goods on the partnership account, it would be necessary for the partner sending goods after such notice to prove some act of adoption by the partner who gave the

*And the mere fact that the goods purchased by the contract came into the possession of the firm is not sufficient evidence of such assent or ratification. (z)

Money lent to one partner for his own expenses, incurred by him in prosecuting the business of the partnership, has been held to be a partnership debt. (a) But a person lending money to one partner, that he may contribute it to increase the capital of the concern, cannot hold the other partners liable, without some evidence of their assent or authority. (b)

*And one attorney, a member of a firm, has no general authority resulting from the nature of their business to borrow mo-

notice, or that he had derived some benefit from the goods." *Feigley v. Sponeberger*, 5 W. & S. 564; *Vice v. Fleming*, 1 Younge & Jerv. 227; 3 Kent, Comm. 45; *Layfield's case*, 1 Salk. 292; *Minnit v. Whinery*, 5 Bro. P. C. 489; *Rooth v. Quinn*, 7 Price, 193. — The implied authority of one partner to draw bills and notes for the partnership is revoked by notice to the person who afterwards receives them that it does not exist. *Galway v. Matthew*, 1 Camp. 403; S. C. 10 East, 264; *Rooth v. Quinn*, 7 Price, 193. The refusal of a partner to give a joint note does not of itself amount to a revocation of the implied authority, but the question is to be submitted as one of *fact* for the jury. *Leavitt v. Peck*, 3 Conn. 124; *Vice v. Fleming*, 1 Younge & Jerv. 227. — This dissent may not perhaps relieve a partner from liability where the partnership consists of more than two, unless the majority dissent. 3 Kent, Comm. 45; Story on Part. § 123; Coll. on Part. § 389, note; *Rooth v. Quinn*, 7 Price, 193; *Kirk v. Hodgson*, 3 Johns. Ch. 400. And it has been held that each partner may bind his copartners by any contract within the scope of the partnership business, notwithstanding they object to the transaction. *Wilkins v. Pearce*, 5 Denio, 541. "By the act of entering into a copartnership, each of its members becomes clothed with full power to make any and every contract within the scope and limits of the copartnership business. All such contracts will therefore be absolutely binding upon the several members. This, however, is incident to the copartnership relation, and must exist, in defiance of expostulations and objections, while the relation

endures." S. C. 2 Comst. 469. — A firm cannot be charged with a debt contracted by one partner, before the partnership was constituted, although the subject-matter which was the consideration of the debt has been carried into the partnership as stock. Nor can the firm be charged with rent which accrued upon a lease to one of the partners. *Brooke v. Evans*, 5 Watts, 196; *Ketchum v. Durfee*, 1 Hoff. Ch. R. 528; *Le Roy v. Johnson*, 2 Peters, 198.

(z) *Monroe v. Conner*, 15 Maine, 178. *Shepley, J.* "It is quite obvious that there may be a difference between the goods coming to the use of the firm, and a benefit derived to the dissenting partner from their delivery to the firm. The bargain may have proved to be a very losing one, and this may have been foreseen by the dissenting partner, and have been the very cause of the notice; and why should he be held to pay, perhaps from his private property, for goods, the purchase and sale of which may have absorbed the whole partnership stock, when he had provided against such a calamity by expressing his dissent from the contract before it was consummated?"

(a) *Rothwell v. Humphreys*, 1 Esp. 406. And see *Ex parte Bonbonus*, 8 Ves. 540. — But if one partner borrow money and give his own security for it, it does not become a partnership debt by being applied to partnership purposes. *Graeff v. Hitchman*, 5 Watts, 454; *Bevan v. Lewis*, 1 Sim. 376; *Emly v. Lye*, 15 East, 6.

(b) *Fisher v. Tayler*, 2 Hare, 218. And see *Greenslade v. Dower*, 7 B. & C. 635.

ney on the credit of the firm. (c) Nor can he bind his co-partner by an indorsement of a writ in his own name. (cc) A lender of money to a partner cannot, in general, recover of the firm, without showing that the money was applied to the use of the firm. But this is not a universal rule. For if this be not shown, and even if it be proved that the money was not so applied, yet the firm will be liable for it, if it were borrowed in their name by a partner whom they had apparently clothed with authority to borrow it for them. (d) This question can be decided in many cases only by the special circumstances attending the transaction. For if money has been actually borrowed by one partner on the *credit of the firm, and in the course of the business of the firm*, the other partners are liable, although the money was misapplied by him who borrowed it. (e) And if the money be borrowed by one partner, not expressly on his individual credit, and it was in part borrowed for and used by the firm, the copartners are liable. (f) And where the money of a third

(c) Breckenridge v. Shrieve, 4 Dana, 378. See also Sims v. Brutton, 1 E. L. & E. 446; Wilkinson v. Candlish, 19 Law J. Rep. Exch. 166; Harmon v. Johnson, 3 Car. & Kir. 277.

(cc) Davis v. Gowen, 17 Maine, 387.

(d) In Etheridge v. Binney, 9 Pick. 272, it was held, that in case of a limited and dormant partnership carried on by one of the partners in his individual name, if he borrow money, *representing it to be for the use of the partnership*, the dormant partners will be liable, without proof by the creditor that the money went to the use of the partnership. But it was held otherwise, if there were no such representations.—See Whitaker v. Brown, 16 Wend. 505, where it was held that a note, given by one partner in the name of the firm, is *of itself* presumptive evidence of the existence of a partnership debt, and if the other partners seek to avoid the payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that also with the knowledge of the payee. See Thicknesse v. Bromilow, 2 Crompt. & Jerv. 425; Barrett v. Swann, 17 Maine, 180; Ensminger v. Marvin, 5 Blackf. 210; Bank of United States v. Binney, 5 Mason, 176.

(e) Emerson v. Harmon, 14 Maine, 271; Church v. Sparrow, 5 Wend. 223; Onondaga County Bank v. De Puy, 17 Wend. 47; Waldo Bank v. Lumbert, 16 Maine, 416; Winship v. Bank of United States, 5 Peters, 529; Steel v. Jennings, Cheeves, 183.—But see Loyd v. Freshfield, 2 Carr. & Payne, 325, where Bayley, J., is reported to have said:—"In point of law, one of several partners may pledge the partnership name for money *bonâ fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purpose of the house. *But if there be gross negligence*, and the transaction be out of the ordinary course of business, the lenders cannot recover of the other partners, if the money be misapplied."

(f) Church v. Sparrow, 5 Wend. 223; Whitaker v. Brown, 16 Wend. 505; Miller v. Manice, 6 Hill, 114.—Whether the money was so borrowed and appropriated is a question for the jury. Church v. Sparrow, *supra*.—In Miller v. Manice, *supra*, Walworth, Ch., is reported to have said:—"Where a third person lends money to one of the co-partners upon the check or notes of the firm, he has a right to presume it is for the use of the firm, unless there is some-

person is in the hands of a copartner as trustee, and he applies it to the use of the firm, with the knowledge and consent of the copartners, they are certainly bound. (*g*) And it has been decided, upon strong reasons, that they are so held without their knowledge and consent. (*h*) Still, if a partner borrows money on his individual credit, and subsequently applies it to the benefit of the firm, this does not make the firm liable to the original lender. (*i*)

thing to create a suspicion that the money is not borrowed for the firm, and that the borrower is committing a fraud upon his copartners. And where money is thus borrowed upon the note or check of the firm, the members of the firm, or those of them to whom the credit was given by the lender, are bound to show not only that the money was not applied to their use, but also that the lender had reason to believe it was not intended to be so applied at the time it was lent. *Bond v. Gibson*, 1 Camp. 185; *Whitaker v. Brown*, 16 Wend. 505." See further, *Jaques v. Marquand*, 6 Cowen, 497.

(*g*) *Hutchinson v. Smith*, 7 Paige, 26; *Jaques v. Marquand*, 6 Cowen, 497.

(*h*) *Richardson v. French*, 4 Met. 577. In this case it was determined that where an administrator, who is a member of a partnership, applies to the partnership concerns money belonging to his intestate's estate, and afterwards gives the note of the firm to a creditor of the intestate, to whom such money was due in discharge of such creditor's claim on the estate, the firm is bound to pay the note, although the money was not in the hands of the firm when the note was given. And *Hubbard, J.*, in giving the opinion of the Court, said:—"The defence relied upon in this case is, that the money of the plaintiff never came to the use of the firm of P. Blodgett & Co., and consequently that the note declared on was without consideration; that if the money in the hands of P. Blodgett, as one of the administrators of George Blodgett, and belonging to that estate, was used by the firm of P. Blodgett & Co., the firm were not the debtors to the several creditors of the estate, between whom and them there was no privity, but to the administrators of the estate; and that the remedy of the

creditors, of whom the plaintiff was one, was on the bond of the administrators. Without controverting this proposition, we think the plaintiff's case can be distinguished from it. The firm of P. Blodgett & Co. have the use of the money of the estate which they have borrowed from the administrators. If then the plaintiff, knowing this, is willing to discharge her claim against the estate, and take, in lieu thereof, the note of the firm, it seems to us that the transaction is a valid one, and that the note is given on a good consideration. Supposing the transaction to appear in the books of the firm, the administrators on the estate of George Blodgett will be charged with the amount of the note given to the plaintiff; and the note will be entered in the account of notes payable, and the receipt of the plaintiff, and her order for her dividend upon the estate, will be a good voucher for the defendants to sustain their charge for so much money returned to the administrators. And we are further of opinion that it was not necessary, as was ruled by the Court of Common Pleas, that the money should have been substantially in hand, at the time of giving the note, to enable the plaintiff to recover upon it against the firm. It was sufficient for that purpose if the money, to which the plaintiff had an equitable claim, had in fact been used by the firm, to authorize the giving of the note so as to bind them; it being the substitution of one creditor of the firm for another, for a good consideration, by consent of the different parties concerned. For whether the defendant, French, was ignorant or not of the giving of the note, at the time, the act of his copartner in this respect is equally binding upon him, the firm having had the money.

(*i*) *Green v. Tanner*, 8 Met. 411; *Bevan v. Lewis*, 1 Sim. 376; *Graeff v.*

It was decided many years ago, in one case, that a purchase by one partner bound the others; and in another case, that a sale by one partner bound the others; (*j*) and these rules are the basis of a partnership liability now. And the seller or the purchaser will not be affected by the fraudulent intention of the partner in the transaction, unless there has been collusion, or want of good faith, or gross negligence, on his part. (*k*) But the power of one partner to dispose of partnership property is confined strictly to personal effects. (*l*) A copartner may bind the firm in matters out of their usual course of business, if they arose out of and were connected with their usual business. (*m*)

Partners may be made liable for the torts of a copartner if if done apparently in due course of the business of the firm, and the existence of the copartnership and its business is that which gives the opportunity for the wrong and injury inflicted

Hitchman, 5 Watts, 454; Logan v. Bond, 13 Geo. 192; Wiggins v. Hammond, 1 Missouri, 121. — If the note be signed A. B., for A. B. & Co., the firm will be liable. *Staats v. Howlett*, 4 Denio, 559. — If a partner borrow money on his own note for the use of the firm, he may afterwards substitute the note of the firm for his own, and it will be no fraud, and the firm will be bound. *Union Bank v. Eaton*, 5 Humph. 499.

(*j*) *Lambert's case*, Godbolt, R. 244; *Hyat v. Hare*, Comb. 383. And see *Winship v. Bank of United States*, 5 Peters, 561; *Walden v. Sherburne*, 15 Johns. 422; *Mills v. Barber*, 4 Day, 430; *Dougal v. Cowles*, 5 Day, 515.

(*k*) *Bond v. Gibson*, 1 Camp. 185. *Assumpsit* for goods sold and delivered. It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number of bits to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his copartner he immediately pawned them to raise money for his own use. *Gazelee*, for the defendant Gibson, contended that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would

have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants. Lord *Ellenborough*: "Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that Jephson here meant to cheat his copartner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that the individual acted for the partnership." Verdict for the plaintiff. — See *McCullough v. Sommerville*, 8 Leigh, 415; *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson v. Tompkins*, 1 Brock. 456; *Pierpoint v. Graham*, 4 Wash. C. C. 234; *Kirby v. Ingersoll*, 1 Harr. Ch. R. 172; *Whitton v. Smith*, Freem. Ch. R. 231.

(*l*) *Anderson v. Tompkins*, 1 Brock. 456. *Shaw, C. J.*, in *Tapley v. Butterfield*, 1 Met. 519; *Coles v. Coles*, 15 Johns. 159. — Nor can one partner, without special authority, bind the firm by a contract for the sale of real estate employed in the business of the firm. *Lawrence v. Taylor*, 5 Hill, 107.

(*m*) *Sandilands v. Marsh*, 2 B. & Ald. 673.

upon the innocent party. (n) It has been held that one partner might bind the firm by a guaranty or letter of credit given in their name; (o) but it seems to be now settled that there must be a special authority for that purpose; but this may be implied from the common course of business or previous transactions between the parties, or from subsequent adop-

(n) *Willet v. Chambers*, Cowper, 814. So where one partner purchases such articles as might be of use in the partnership business, and instantly converts them to his own separate use, the partnership is liable. *Bond v. Gibson*, 1 Camp. 185. A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same on commission. C., the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transactions were wholly fictitious, but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to be resold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for. *Held*, that B. was liable for the false representations of his partner; and that A. was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real. *Rapp v. Latham*, 2 B. & Ald. 795. See *Stone v. Marsh*, 6 B. & C. 551, (*Fauntleroy's case*); *Hume v. Bolland*, *Ryan & Moody*, 371; *Kilby v. Wilson*, *Ryan & Moody*, 178; *Edmonson v. Davis*, 4 Esp. 14; *Moreton v. Hardern*, 4 B. & C. 223; *Babcock v. Stone*, 3 McLean, 172.—The conversion by one partner of property which came into the possession of the firm on partnership account, is the conversion of all. *Nisbet v. Patton*, 4 Rawle, 120. The partnership is liable to the innocent indorsee of a promissory note signed by one of the members in the name of the firm, without the knowledge or consent of his partner; although the note was given for a debt unconnected with the business of the partnership. *Boardman v. Gore*, 15 Mass.

331. So the partnership is liable for the fraudulent representations of a partner relative to matters in the course of its business, although without the knowledge of his copartners. *Doremus v. McCormick*, 7 Gill, 49; *Beach v. State Bank*, 2 Cart. (Ind.) 489; *Hawkins v. Appleby*, 2 Sand. S. C. R. 421. *Sandford, J.* "It has long been established that a partner is liable in assumption for the consequences of frauds practised by his copartner in the transaction of the business, of which he was entirely ignorant, and although he derived no benefit from the fraud. This is upon the ground that, by forming the connection, partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do within the scope of their partnership business; and if, by the wrongful act of one, a loss must fall upon a stranger, or upon the other partner, who is equally innocent, the latter having been the cause or occasion of the confidence reposed in his delinquent associate, must suffer the loss." It is held that the implied authority of a partner does not extend to illegal contracts, as the borrowing of money at usurious interest, and will not bind his copartners without their knowledge or consent. *Hutchins v. Turner*, 8 Humph. 415. The court in this case said:—"The liability of a partner, arising out of this implied assent, and undertaking to be responsible for the acts of his copartner on behalf of the firm, in the ordinary business and transactions thereof, cannot be held to extend to illegal contracts. This would be absurd. An agency or authority to a partner to violate the provisions of a public statute cannot be implied; nor can it be implied that such illegal act is within the scope of the partnership, which could only exist for lawful purposes."

(o) *Hope v. Cust*, cited in 1 East, 48; *Ex parte Gardom*, 15 Vesey, 286.

tion by the firm. (*p*) And if, the word "surety" be added to the signature of the firm, this casts upon the holder the burden of proving the assent of the firm. (*q*) And if the signature or indorsement be in the usual form, but the party receiving it knows that it is given by way of suretyship, he must prove by direct evidence or equivalent circumstances the assent of the partners. (*r*)

A release by one partner is a release by all, both in law and in equity. (*s*) And a release to one partner is a release to all. (*t*) But any fraud or collusion destroys the effect of such release. And the release to discharge absolutely all the copartners, must be a technical release under seal. (*u*) And

(*p*) *Crawford v. Stirling*, 4 Esp. N. P. 207; *Sutton v. Irwine*, 12 S. & R. 13; *Ex parte Nolte*, 2 G. & Jameson, 295; *Hamill v. Purvis*, 2 Penn. Rep. 177; *Cremer v. Higginson*, 1 Mason, 323; *Foote v. Sabin*, 19 Johns. 154; *Laverly v. Burr*, 1 Wend. 531; *N. Y. Fire Insurance Co. v. Bennett*, 5 Conn. 574; *Andrews v. Planters Bank*, 7 Sm. & Mar. 192; *Langan v. Hewett*, 13 Sm. & Mar. 122.

(*q*) *Boyd v. Plumb*, 7 Wend. 309; *Rollins v. Stevens*, 31 Maine, 454.

(*r*) *Darling v. March*, 22 Maine, 188.

(*s*) *Pierson v. Hooker*, 3 Johns. 68; *Bruen v. Marquand*, 17 Johns. 58; *Salmon v. Davis*, 4 Binney, 375; *Morse v. Bellows*, 7 New Hamp. 567; *Halsey v. Whitney*, 4 Mason, 206; *Smith v. Stone*, 4 Gill & Johns. 310; *McBride v. Hagan*, 1 Wend. 326. The rule of law and equity is the same, and only collusion for fraudulent purposes between the partners and a debtor destroys the effect of such release. *Barker v. Richardson*, 1 You. & Jer. 362; *Cram v. Cadwell*, 5 Cowen, 489.—And the fraud must be clearly established. *Arton v. Booth*, 4 Moore, 192; *Furnival v. Weston*, 7 Moore, 356. And see *Legh v. Legh*, 1 B. & P. 447; *Jones v. Herbert*, 7 Taunt. 421; *Mountstephen v. Brooke*, 1 Chitty, 391.—Where one partner signed a general release to a debtor of the firm, and it did not appear whether it was intended to apply to separate or to partnership demands, or whether the subscribing partner had on his separate account any demand against the debtor, the release was held a discharge from debts due the

partnership. The release was a part of an indenture of assignment, in trust for creditors. *Emerson v. Knower*, 8 Pick. 63.—Where such release is for all demands, parol proof is not admissible that a particular debt was not intended to be released. *Pierson v. Hooker*, 3 Johns. 68.

(*t*) *Hammou v. Roll*, March, 202; *Bower v. Swadlin*, 1 Atk. 294; *Collins v. Prosser*, 1 B. & C. 682; *American Bank v. Doolittle*, 14 Pick. 126; *Goodnow v. Smith*, 18 Pick. 416; *Clagett v. Salmon*, 5 Gill & Johns. 314; *Burson v. Kincaid*, 3 Penn. 57.—So a discharge of one surety of his whole liability is a discharge to the others. *Nicholson v. Revill*, 4 Ad. & El. 675; *Mayhew v. Crickett*, 2 Swanst. 192.—But a release to one partner may, by means of recitals and provisos, be limited in its operations to the partner to whom it is given. *Solly v. Forbes*, 4 Moore, 448, 2 Brod. & Bing. 38. See *Wiggin v. Tudor*, 23 Pick. 444.

(*u*) *Shaw v. Pratt*, 22 Pick. 305; *Walker v. McCulloch*, 4 Greenl. 421; *Harrison v. Close*, 2 Johns. 449; *Catskill Bank v. Messenger*, 9 Cowen, 37; *Lunt v. Stevens*, 24 Maine, 534; *Shotwell v. Miller*, Coxe, 81.—It has been held that a composition deed, given by the joint creditors of a partnership upon its dissolution to that partner who winds up the affairs of the firm, is in the nature of a release, and will discharge the other partner from his liability. *Ex parte Slater*, 6 Vesey, 146.—But a covenant not to sue one of several partners will not have the same effect. Coll. on Part. § 608, and cases cited.

a discharge of one of several joint debtors by operation of law, without the consent or coöperation of the creditor, takes from him no remedy against the other debtor. (*v*)

The signature or acknowledgment of one partner, in matters relating to the partnership, in general binds the firm; (*w*) as notice in legal proceedings, or abandonment to insurers by one who has effected insurance for himself and others. (*x*) And if one of several joint lessors, partners in trade, sign a notice to quit, this will be valid for all; (*y*) but not if they are not partners in trade. (*z*) And in general a notice to one partner is binding upon all. (*a*) Where a bill accepted by a firm is dishonored by one partner, notice of the dishonor need not be given to the other partners; (*b*) and where a bill or note is indorsed by a firm, which is dissolved before the note is due, notice to one of the partners by a holder not having knowledge of the dissolution, is sufficient. (*c*) And where the

(*v*) *Ward v. Johnson*, 13 Mass. 152; *Robertson v. Smith*, 18 Johns. 459; *Tooker v. Bennett*, 3 Caines, 4; *Townsend v. Riddle*, 2 N. H. 449.

(*w*) See *Corps v. Robinson*, 2 Wash. C. C. 388; *Bound v. Lathrop*, 4 Conn. 336; *Fisk v. Copeland*, *Overt*. 383.—During the partnership one may enter an appearance in an action to bind the whole. *Bennett v. Stickney*, 17 Verm. 531. See *contra*, *Haslet v. Street*, 2 McCord, 311; *Loomis v. Pierson*, *Harper*, 470. But after dissolution one cannot acknowledge service for the firm. *Demott v. Swaim*, 5 Stew. & Porter, 293. And service of process upon one partner, after dissolution, will not authorize a judgment against the firm. *Duncan v. Tombeckbee Bank*, 4 Porter, 181.

(*x*) *Hunt v. Royal Ex. Assurance Co.* 5 Maule & Sel. 47. So if one partner, for himself and partner, sign a note for the weekly payment under the Lord's act, such note will bind the firm. *Meux v. Humphrey*, 8 Term, 25; *Burton v. Issit*, 5 Barn. & Ald. 267.

(*y*) *Doe v. Hulme*, 2 Mann. & Ryl. 483.

(*z*) *Goodtitle v. Woodward*, 3 B. & Ald. 689. But one joint tenant may appoint a bailiff to distrain for rent due all the joint tenants. *Robinson v. Hofman*, 4 Bing. 562. And one partner may authorize a clerk to draw or accept

notes or bills, in the name of the company. *Tillier v. Whitehead*, 1 Dall. 269.

(*a*) *Alderson v. Pope*, 1 Camp. 404; *Ex parte Waitman*, 1 Mont. & Ayr. 364; *Figgins v. Ward*, 2 C. & M. 424; *Carter v. Southall*, 3 Mees. & Wels. 128.—Notice to one of several partners of a prior unrecorded deed is notice to all the partners, and will avoid a deed subsequently made of the same land to all the partners. *Barney v. Currier*, 1 Chipman, 315; *Gilby v. Singleton*, 3 Litt. 250. So, notice of want of consideration for a promissory note to one partner affects the rest. *Quinn v. Fuller*, 7 Cush. 224.—So, in equity, service of a subpœna upon one partner may, upon notice, be made good service upon his copartner abroad. *Carrington v. Cantillon*, Bunb. 107; *Coles v. Gurney*, 1 Madd. 187. And see *Lansing v. McKillup*, 7 Cowen, 416.

(*b*) *Porthouse v. Parker*, 1 Camp. 82. See *Dabney v. Stidger*, 4 Smedes & Marsh. 749. But it is otherwise in case of mere joint indorsers, who are *not* partners; notice in such case must be given to both. *Shepard v. Hawley*, 1 Conn. 368. Even, it seems, to hold either. *Bank, &c., v. Root*, 4 Cowen, 126.

(*c*) *Coster v. Thomason*, 19 Ala. 717; *Nott v. Douming*, 6 Louis. R. 684. And in such case it has been said, that one partner may, after dissolution, waive de-

*drawer of a bill is a partner of the house on whom it is drawn, he is chargeable without notice to him of the dishonor of the bill. (d)

In some cases very slight circumstances appear to be sufficient to affect a party with the liabilities of partnership. (e)

*But the mere fact of persons giving a joint order for goods will not make them liable as partners, if it appear otherwise that the seller trusted to them severally. (f) Nor is a person made a partner by a stipulation that a firm will be governed by his advice. (g)

mand and notice for the other partners as well as for himself. *Darling v. March*, 22 Maine, 184. But this may be doubted.

(d) *Gowan v. Jackson*, 20 Johns. 176. Notice of the dishonor of a note given to the surviving partner of a firm fixes the liability of the partnership, and binds the representatives of the deceased partner. *Dabney v. Stidger*, 4 Smedes & Marsh. 749; *Cocke v. Bank of Tennessee*, 6 Humph. 51.

(e) *Parker v. Barker*, 1 Brod. & Bing. 9; 3 Moore, 226.—Persons are to be treated as partners if they so conduct and hold themselves out to others, whether their contract would make them so or not. *Stearns v. Haven*, 14 Verm. 540. See notes *f*, *g*, and *h*, post.

(f) *Gibson v. Lupton*, 9 Bing. 297. In this case the two defendants, who were not general partners, gave a joint order to the plaintiff's agent for the purchase of some wheat. The order contained these words, "payment for the same to be drawn upon each of us in the usual manner." In reply to this order the plaintiffs wrote to the defendants:—"We have made a purchase for your joint account." At the same time they drew a bill upon each defendant for one third of the price, each bill being for one moiety of the third. They afterwards, on the wheat being shipped, drew like bills for the remainder of the price, having previously written, "We hold you both harmless for the advance up to the period of lading and invoice." The bill of lading, on coming into the possession of the defendants, was indorsed by each of them. Under these circumstances the Court of Common Pleas held that the defendants were only severally liable on the contract, each being responsible

for the purchase of a moiety only of the cargo. See also *Hopkins v. Smith*, 11 Johns. 161; *Livingston v. Roosevelt*, 4 Johns. 266; *McIver v. Humble*, 16 East, 169.—So where in an action of assumpsit C. was charged as a partner with A., on the authority of B., who informed the plaintiff before he furnished the goods they were in partnership, and, at the trial, B.'s clerk proved that B. had been in the habit of discounting bills for A. and that in discounting a bill at one time for A., he had introduced C. to him as his partner, but that the only connection in trade between B. and the defendants was in discounting bills; Lord *Kenyon* said that this evidence was not sufficient to charge C. as A.'s partner; that the introduction of C. to B. should be taken *secundum subjectam materiam*, that is, as applying to a transaction in which A. was concerned with B., the discounting of bills, to which transaction only it should be confined. *De Berkom v. Smith*, 1 Esp. 29; see also *Livingston v. Roosevelt*, 4 Johns. 266.

(g) *Barklie v. Scott*, 1 Huds. & Bro. 83. Because it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership.—So the facts that several persons associated together to run a line of stage-coaches, that they had a general meeting, and that debts were contracted on account of the company, do not prove a partnership as between themselves. *Chandler v. Brainard*, 14 Pick. 285; *Clark v. Reed*, 11 Pick. 446.—And the fact that two persons sign a note jointly was held not evidence of a partnership between them. *Hopkins v. Smith*, 11 Johns. 161. But see *Carwick v. Vickery*, Douglas, 653; *De Ber-*

No particular mode of holding oneself out as a partner is necessary to make one liable as such; but it must be a voluntary act; for otherwise a party might be charged with a ruinous responsibility without his knowledge, intention, or assent, and without fault on his part, and through the fraud or wrongful *acts of others. (*h*) Where a person is received as a new member into an old firm, and the new firm recognizes, by payment of interest, a debt of the old firm, this is in general evidence of an adoption of the debt by the new firm, including the new partner, which will make him liable; (*i*) but it has

kom v. Smith, 1 Esp. 29; 3 Kent, (5th Ed.) 30, and note. See farther what facts will constitute a partnership. Smith v. Edwards, 2 Harr. & Gill, 411.—Where the terms of the agreement and the facts are admitted, it is always a question of law whether there was a partnership or not. See *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 N. & McC. 20; *Drake v. Elwyn*, 1 Caines, 184; *Beecham v. Dodd*, 3 Harr. 485.

(*h*) Such circumstances as, according to the custom of merchants, usually indicate a partnership, may be given in evidence against one whom it is sought to charge as a partner; such as the use of his name in printed invoices, bills of parcels, and advertisements, or on the printed signs attached to the place of business; and these may afford strong presumptive evidence of his acquiescence in the name and character of partner. In general, if he so acts as to justify others in believing him a partner, he will be liable as such. *Spencer v. Billing*, 3 Camp. 310; *Parker v. Barker*, 1 Brod. & Bing. 9, 3 Moore, 226. Nevertheless, this evidence may be rebutted by showing either that he was entirely ignorant of these transactions, or that he took the proper means of disowning them and denying his authority. One is not liable as a nominal partner because others use his name as that of a member of a firm, without his consent, although he previously belonged to the firm; provided he has taken the proper steps to notify the public of his retirement. *Newsome v. Coles*, 2 Camp. 617. And the plaintiff should be prepared to show that the acts of the defendant, which he relies on as acts of partnership were done by the defendant, with full knowledge and deliberation on his part.

See *Fox v. Clifton*, 6 Bing. 776, 4 M. & P. 713.

(*i*) *Ex parte Jackson*, 1 Ves. 131. The general rule, as well as the exceptions to it which may possibly occur, are well illustrated by the case of *Ex parte Peele*, 6 Ves. 602. There *Kirk*, a warehouseman, carrying on business under the firm of *Kirk & Company*, being indebted to *Sir Robert Peele* for goods sold, after that debt was contracted had entered into a treaty with *Ford*, a breeches-maker, for forming a partnership. About four months afterwards a commission of bankruptcy issued against them. No articles having been executed, *Ford* disputed the point of partnership, which was tried at law, and the partnership was established upon the evidence of acts done. A petition was presented by *Sir Robert Peele* to prove his debt as a joint debt. In support of the petition the affidavit of one *Copeland* stated, that it was agreed that the separate debts of *Kirk* should be assumed by the partnership; that entries were made in the books with the knowledge of *Ford*; and, particularly, that the goods furnished by the petitioner were entered at a reduced price. This was opposed by the affidavit of *Ford*, denying the agreement, or even knowledge of these circumstances. Lord *Eldon*: "I agree it is settled that if a man gives a partnership engagement in the partnership name, with regard to a transaction, not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say that, although in its nature not a partnership transaction, yet there was some authority beyond the mere circumstance of partnership to enter into that contract, so as to bind the partnership, and then it depends upon the de-

not always nor necessarily this effect. Some knowledge and assent of this payment must be brought home to the new partner, and perhaps some evidence of assent by the creditor to the transfer of the debt from the old to the new firm. (j) The liability of an incoming partner for old debts is not to be presumed. (k)

The authority of a partner to bind his firm rests indeed upon a necessity; for mercantile business could not be carried on by a partnership otherwise, without great inconvenience. And it is bounded and measured by this necessity,

gree of evidence. Slight circumstances might be sufficient where in the original transaction the party to be bound was not a partner but at the subsequent time had acquired all the benefit, as if he had been a partner in the original transaction; and it would not be unwholesome for a jury to infer largely that that obligation, clearly according to conscience, had been given upon an implied authority. So here, if this was a case in which it was found upon the trial that this man was a partner upon a long-existing partnership, with a regular series of transaction, books, &c., a knowledge of what his partner had been doing might be inferred against him; that which in common prudence he ought to have known. But that is not the case of this partnership: it was a treaty. It is not even yet agreed how the stock and partnership were to be formed. In the course of that treaty, Ford, ignorant of law, permits acts to be done which the law holds to be partnership acts. It is a very different consideration whether this man, so trepanned into a partnership, had got regular books, &c.; and it is difficult to say, not only that knowing this he had agreed to it, but that he knew it; in which case I am afraid he must be bound. That fact has not been sufficiently inquired into." The order, therefore, directed a reference to the commissioners to inquire whether, at the commencement of the partnership, any debts due from Kirk, for his stock in trade, were assumed, and any debts to him carried into the partnership, with the knowledge and assent of Ford.

(j) *Kirwan v. Kirwan*, 2 Crompt. & Mees. 617. In this case it appeared that A. kept an account in the nature of a banking account with the firm of B. & Co., and annual accounts were

rendered to him. During the time that A. dealt with the firm, all the partners retired except C., who formed a new partnership with K. On the accession of K. a large capital was brought into the concern. A.'s account was then transferred from the books of the old to those of the new partnership, and the balance was struck annually as before; and A., until his death, which happened about three years afterwards, received sums on account, and interest on his balance from the new firm, in the same manner as before. Upon the death of A., his administrators brought an action against the *quondam* partners and C. to recover the balance, and in that action the *quondam* partners contended that their responsibility had shifted to C. & K., and it was argued in their behalf that the transfer of the account into the books of the new firm, and the payments of money to A., amounted to evidence against K. that he intended to take the debt upon him. But the Court of Exchequer were of opinion that no inference of that sort could be drawn, in the absence of any proof of A.'s assent to the substitution of K. as his debtor, for the original partners; and *Bolland, B.*, observed further, that there was nothing to show that K. undertook to answer for the debts of the old firm, and the probabilities were that he would not incur further responsibilities. And although the account was transferred from the old to the new firm, the learned judge conceived that there might be many ways in which interest might be paid without K. being aware of it; and the manner of keeping the accounts led to the supposition that he was not aware of it. See also *Ex parte Sandham*, 4 Deacon & Chitty, 812.

(k) See *Catt v. Howard*, 3 Starkie, 5.

so that the partnership is not bound by the acts or contracts of any partner, not within the legitimate scope of the partnership business. (*kk*) An illustration of this may be found in the rule which is held by authorities of great weight, that one partner cannot bind his firm by a submission to arbitration, without specific authority from his copartners; the reason given for this rule being, that a partner has no implied authority, except so far as is necessary to carry on the business of the firm. (*l*) Another reason is also given, that such *implied authority would deprive the other partners of their legal rights or remedies.

SECTION XIII.

POWER OF A MAJORITY.

Whether the majority of the partners of a firm can bind the minority, is not yet quite determined by authority. Some cases show a disposition to admit this power, but to confine its exercise to the internal concerns of the firm, or to those which are of little importance. The authorities on this subject will be found in our notes. (*m*) We think a distinction

(*kk*) *Dickinson v. Valpy*, 10 B. & Cr. 128; *Sandilands v. Marsh*, 2 B. & Ald. 673; *Sims v. Brutton*, 1 E. L. & E. 446. One partner cannot bind the firm or transfer its property for his private debt. *Kemeys v. Richards*, 11 Barb. 312; *Lanier v. McCabe*, 2 Flor. 32; unless the other partners authorize or ratify the act. *Wheeler v. Rice*, 8 Cush. 205.

(*l*) *Stead v. Salt*, 3 Bing. 101; *Kartaus v. Ferrer*, 1 Peters, 228; *Buchanan v. Curry*, 19 Johns. 137; *Harrington v. Higham*, 13 Barb. 660; S. C. 15 Barb. 524. But see *Wilcox v. Singleary*, Wright R. 420; *Southard v. Steele*, 3 Monroe, 435; *Armstrong v. Robinson*, 5 Gill & Johns. 412; *Taylor v. Coryell*, 12 Serg. & Rawle, 243.

(*m*) It has been laid down by a learned writer, (*Chitty's Laws of Commerce*, vol. 3, p. 236,) that in the absence of any express stipulation a majority must decide as to the disposition of the partnership property. But this

opinion is given with considerable caution, and it may perhaps be more safe to say, that the power of the majority to bind the minority is confined to the ordinary transactions of the partnership. See 6 Vesey, 777; 5 Bro. P. C. 489. It is true that in one case it has been held that in all sea adventures the acts of the majority shall bind the whole; but in that case provision to that effect was made by deed. *Falkland v. Cheney*, 5 Bro. P. C. 476. So in *Const v. Harris*, Turn. & Russ. 525. Lord *Eldon's* opinion was in favor of the power of a majority to bind the minority, provided their conduct was *bonâ fide*. His lordship said:—"I call that the act of all which is the act of the majority, provided all are consulted, and the majority act *bonâ fide*." The majority of partners do not represent the whole body, except when the voice of the minority has been called for. In such case the court will take the opinion of the minority to have been fairly overruled. See

might be drawn on principle, between partnerships made by articles, and by their provisions not determinable by either party at pleasure, and those which by mutual consent may be dissolved and terminated at once by either party, at his own will and pleasure. In the former case, it might be said that the majority should not be permitted to govern, because the minority have no refuge, no escape by dissolution; and if controlled absolutely by the majority, they might be made to incur unreasonable danger. But where any dissenting partner may dissolve the partnership at pleasure, then the majority should govern. Because that is but saying to the minority, choose either to go on with us in the transaction we propose *and approve, or leave us to go on by ourselves, as you prefer. Where the copartnership is determinable at the will of any partner, the rule that the majority may govern only terminates a partnership between disagreeing partners. Where the partnership is not determinable at pleasure, it may be said that the rule that a minority may arrest or prohibit a transaction which they do not approve, gives them in fact a power to terminate a copartnership at pleasure, because if they can arrest one transaction, they may all. This is possible; but the inconveniences resulting from it seem to be less than those which might come from permitting a bare majority to retain the capital of copartners, and employ it in transactions which they disapprove, and expose it to hazards they are unwilling to encounter. Moreover, the opposite rule—that the majority might govern—would give to them the power of dissolving the partnership at pleasure; because, if they wished for a dissolution, they could always propose transactions so adverse to the views or interests of the minority as to compel them to assent to a dissolution as their only escape. It must be regarded as certain that a majority cannot compel a minority to extend the business of the partnership to transactions beyond their original intention, or otherwise make a material change in the business, not contemplated

also *Kirk v. Hodgson*, 3 Johns. Ch. 400; *Kent's Comm.* 45, and note; *Story on
Wilkins v. Pearce*, 5 Denio, 541; *Robinson v. Thompson*, 1 Vernon, 465; 3

in the formation of the partnership, nor sanctioned by all the partners.

SECTION XIV.

OF DISSOLUTION.

The dissolution of a partnership does not affect the liability of the partners for former debts, but, in general, prevents the incurring of a new joint liability. And it is important to know what makes a dissolution. Where a partnership is not to endure for a time certain by the articles of copartnership, or where that time has expired, it may be dissolved at the pleasure of any partner. (*n*) Whether, when the partnership is by articles which stipulate its continuance for a specified period, one partner may dissolve it within that period, is not, perhaps, quite certain. By the civil law, such dissolution is permitted, on the ground that it would be useless and mischievous to hold reluctant partners together. (*o*) In England the weight of authority is decidedly opposed to such dissolution, as a breach of contract (*p*); still, it is difficult to deny that one may assign his interest, and this would operate a dissolution; or he might contract a debt, and let his interest be taken in execution. A court of equity might interfere to prevent such assignment; but would not, in case of debt,

(*n*) *Griswold v. Waddington*, 15 Johns. 82. — But notice should be given to the other partner. *Nerot v. Burnand*, 4 Russ. 260; *Peacock v. Peacock*, 16 Ves. 50. — This should be a reasonable notice where the articles are totally silent upon the subject, and where, without such notice, injury would be inflicted, or fraud indicated. *Howell v. Harvey*, 5 Ark. 280. — The duration may be gathered from the terms of the articles, although not expressly provided for. *Wheeler v. Van Wart*, 2 Jurist, 252. See also *Crawshay v. Collins*, 15 Ves. 227; *Wilson v. Greenwood*, 1 Swanst. 480; *Washburn v. Goodman*, 17 Pick. 519. — In the late case of *Sanderson v. The*

Milton Stage Co. 18 Verm. 107, it was held, where one partner gave the other notice that the copartnership was dissolved, but this was not assented to by the other, and the parties did not afterwards act upon it, that it did not operate as a dissolution of the firm.

(*o*) *Vinnius* in Ins. 3, 26, 4; *Ferriere* in Id. tome V. 156; Dig. 17, 2, 14; *Domat*, b. 1, tit. 8, § 5, art. 1-8, by *Strahan*.

(*p*) *Peacock v. Peacock*, 16 Ves. 56; *Crawshay v. Maule*, 1 Swanst. 495. See *Pearpoint v. Graham*, 4 Wash. C. C. 234, where *Washington, J.* distinctly affirms the rule indicated by the English authorities.

unless there was collusion, or the creditor's interest could be otherwise secured. (q)

It has been questioned whether a court would infer an agreement for a continuance of the partnership for a definite period, from circumstances; as the taking of a lease of an estate to be used as partnership property, or the like. But it may well be doubted, whether such an inference would be drawn merely from circumstances, unless they made the agreement quite certain. (r)

Any assignment of a copartner's interest in the partnership funds operates *ipso facto* a dissolution; although the assignment was made only to give a collateral security. (s) And

(q) *Marquand v. N. Y. Man. Co.* 17 Johns. 525. In this case, the assignment by one partner of all his interest in the partnership was held to dissolve it, although by the articles it was to continue till two partners should demand its dissolution. In *Skinner v. Dayton*, 19 Johns. 538, it was held that the partnership is dissoluble at the pleasure of any partner, although he has entered into a covenant for its continuance for seven years—the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. See *Mason v. Connell*, 1 Wharton, 388; *Whitton v. Smith*, 1 Freem. Ch. (Miss.) 231. In *Bishop v. Breckles*, 1 Hoffm. Ch. 534, the question was considered doubtful, but the rule of the civil law deemed more reasonable and the refusal of one partner to proceed properly in the business of the partnership, was held sufficient cause for a decree of dissolution. Per Vice-Chancellor: "The law of the court, then, requires something more than the mere will of one party to justify a dissolution. But it seems to me that but little should be demanded. The principle of the civil law is the most wise. Why should this court compel the continuance of a union, when dissension has marred all prospect of the advantages contemplated by its formation? By refusing to dissolve it, the power of binding each other, and of dealing with the partnership property, remains, when all confidence and all combination of effort is at an end. The object of the contract is defeated."

(r) *Crawshay v. Maule*, 1 Swanst. 495, 508, 521. *Lord Eldon*: "Without doubt, in the absence of an express, there may be an implied contract, as to the duration of a partnership. But I must contradict all authority, if I say, that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the court holding that a lease of seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee-simple, there shall be a partnership forever." See *Marshall v. Marshall*, cited 2 Bell's Comm. 641, n. 3, and 643, n. 1.

(s) *Horton's Appeal*, 13 Penn. 67; *Parkhurst v. Kinsman*, 1 Blatch. 488; *Marquand v. New York Manuf. Co.* 17 Johns. 525.—In *Whitton v. Smith*, 1 Freem. (Miss.) 231, it was held that a sale or assignment by one partner of all his interest in the partnership property, operates as a dissolution, *ipso facto*, although the partnership articles provide for a continuance of the partnership for a definite period.—See *Conwell v. Sandidge*, 5 Dana, 213; *Cochran v. Perry*, 8 Watts & Serg. 262.—But the true principle seems to be stated in *Taft v. Buffum*, 14 Pick. 322. In this case, one of four members of a firm assigned the whole of his interest in all the personal and real estate of the firm to one of his copartners, but still continued to transact the business of the firm in the

an assignment by one partner of his share of the profits to *another partner is a dissolution of the partnership, because the essence of that is a participation of the profits. (t)

As death operates of itself a dissolution, (u) so in England civil death has the same effect; as outlawry, or attainder for treason or felony. We have not this civil death in this country; and imprisonment for a term of years, or even for life, would probably have only the effect of other incapacity. That is, it would not be a dissolution of the partnership, nor cause a dissolution at once, *proprio vigore*, but it would be good ground for applying to any court, having authority, to grant a dissolution. When either partner becomes disabled to act, or when the business becomes wholly impracticable, a court of equity would dissolve the partnership, or treat it as dissolv-

same manner as before, until the failure of the company; a suit was commenced against the remaining three members of the firm; they pleaded in abatement the non-joinder of the party who had so assigned his share, and the court held that a conveyance by a partner of all his interest in all the real and personal estate of the firm to one of his copartners, does not *ipso facto* dissolve the copartnership; it is only evidence tending to show a dissolution. In this case the court say that a person may still be a partner, though he ceases to have any property in the stock of a partnership, on the principle that two persons may become partners, one furnishing money or goods, and the other skill or labor; or after persons have entered into a partnership, and each has furnished capital, one may, with the consent of his associates, and for good consideration, as of great skill or labor, withdraw his funds or share in the stock, and still continue to be a member of the firm. *Putnam*, J. remarked: "We think that such an arrangement would not necessarily operate as a dissolution of the connection." He adds: "A majority of the court are of opinion that it [the fact of the sale by one partner] was evidence in the case, which might or might not prove a dissolution, as other facts might be proved in the case, all of which should have been left to the jury, to determine the fact whether the partnership had been dissolved or not. For example; if, after a

sale, the partner assigning his interest had ceased to have any concern in the establishment, had entered into other business on his own separate account, or, as it might be, had removed to a foreign country or place, and there carried on business for himself, or lived upon his own funds or otherwise; upon such evidence we should all think that the jury ought to find that the copartnership was dissolved. On the other hand, if (as in the present case it is found) the partner so assigning, after the conveyance, continued to act as a partner, making himself liable as such by drafts and other partnership business, just as he had done before the conveyance; then it would seem to a majority of the court that the jury ought to find that the partnership was not dissolved." Coll. on Part. § 110.—See *Buford v. McNeeley*, 2 Dev. Eq. 481; *Dana v. Lull*, 17 Verm. 390.

(t) *Heath v. Sansom*, 4 B. & Ad. 175.

(u) *Vulliamy v. Noble*, 3 Meriv. 593; *Murray v. Mumford*, 6 Cowen, 441; *Canfield v. Hard*, 6 Conn. 184; *Burwell v. Mandeville*, 2 How. 560; *Knapp v. McBride*, 7 Ala. 19.—In such case the dissolution takes effect from the time of the death, however numerous the association, and this not only as to the deceased partner, but also as to all of the survivors. *Dyer v. Clark*, 5 Met. 575; *Scholefield v. Eichelberger*, 7 Pet. 586. And the same rule applies to a silent

ed, as the justice of the case might require. (*uu*) The contract of partnership is mutual; and it would be obviously unjust to hold one party to his contract, when it had become impossible for the other to fulfil his part. If the party so disabled from active aid, was, by the terms of the contract, only a silent or dormant partner, only contributing capital, and sharing with his partner the profit and loss arising from the use made of the capital by the active partner, the above reason would seem not applicable, because his capital might remain as before. But in this case, if an application comes from the active partner, he certainly should be permitted to renounce the benefit of the capital under such circumstances, if he wished to do so. And if the application comes from the party owning the capital, or his representatives, they as certainly ought to be permitted to withdraw the capital from hazards which the owner could no longer estimate nor provide for, nor advise in relation to them. And we think with Mr. Justice Story and Mr. Chief Justice Parker, that it may well be doubted whether the rule of law should not be that *absolute insanity, or any equivalent disability, operates at once, and *ipso facto*, a dissolution. (*v*)

Bankruptcy of the firm, or of one partner, operates an immediate dissolution. (*w*) Insolvency under the statutes would

partner. Washburn *v.* Goodman, 17 Pick. 520.

(*uu*) Leaf *v.* Coles, 12 E. L. & E. 117.

(*v*) Story on Partn. § 295; Jones *v.* Noy, 2 Myl. & K. 125. In Isler *v.* Baker, 6 Humph. 85, it was held, that an inquisition of lunacy, found against a member of a partnership, *ipso facto* dissolves the partnership. See also Griswold *v.* Waddington, 15 Johns. 57; Davis *v.* Lane, 10 N. H. 161, where Parker, C. J., is reported to have said: "It has been held, in England, that the insanity of one partner does not operate as a dissolution of the partnership, but that object must be attained through a court of equity. Sayer *v.* Bennet, cited 2 Ves. & Bea. 303; Gow on Part. [272.] But the soundness of the principle may perhaps be doubted. Waters *v.* Taylor, 2 Ves. & Bea. 303; Griswold *v.* Waddington, 15 Johns. 57, 82. It certainly could not have been applied here prior to 1832, as we had before that time no

court through whose decree in equity a dissolution could have been effected. Admitting it to be correct in its fullest extent, however, it would not affect this case, for each partner has an interest by the partnership contract, and the interest of one partner would not be terminated by the insanity of another. In making a sale, or contract, he does not act as agent, but in his own right; and the partnership name may be used by one, without any supposition that another acts, individually, or has any knowledge or volition in relation to the matter. But so long as the partnership continues, the act of one binds the others; and as it is, in its effect, the act of all the partners, it may deserve great consideration whether the insanity of one, in the absence of any stipulation to the contrary, does not operate *ipso facto* as a dissolution of the partnership itself."

(*w*) Fox *v.* Hanbury, Cowper, 448. Lord Mansfield. "An act of bank-

have the same effect; (x) but not the mere insolvency which is only an inability to pay debts, until a refusal to pay; and probably not until interference by attachment or other legal process with the firm, by a creditor of the firm, or of an indebted partner. In the last case it would seem to operate as a transfer of the partner's interest. (y)

Whether a partnership is absolutely dissolved or only suspended where the partners are domiciled in different countries, by the breaking out of a war between the countries, may not be positively settled, but the weight of authority is in favor of the dissolution. (z)

Although the death of a partner operates a dissolution of

ruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade." See *Wilson v. Greenwood*, 1 Swanst. 482; *Ex parte Smith*, 5 Ves. 295; *Ex parte Williams*, 11 Ves. 5; *Crawshay v. Collins*, 15 Ves. 218; *Dutton v. Morrison*, 17 Ves. 193; *Griswold v. Waddington*, 15 Johns. 82; S. C. 16 Johns. 491; *Marquand v. N. Y. Man. Co.* 17 Johns. 535; *Arnold v. Brown*, 24 Pick. 89; *Atwood v. Gillett*, 2 Doug. (Mich.) 206; *Collyer on Part. B. 1*, ch. 2, sect. 2; *Story on Part. § 313*. But "an act of bankruptcy, however, does not dissolve the partnership *instantly*. It must be followed by a fiat and adjudication. 'The adjudication that he is a bankrupt,' said Lord Loughborough, 'is what severs the partnership.'" *Collyer on Part. § 111; Ex parte Smith*, 5 Ves. 295; *Story on Part. § 314*. The English law gives effect to the dissolution from the declaration of bankruptcy under a commission; but this relates back to the act of bankruptcy, and vests the property in the assignees from that period by operation of law. *Fox v. Hanbury*, *supra*; *Ex parte Smith*, 5 Ves. 296; *Barker v. Goodair*, 11 Ves. 83; *Thomason v. Frere*, 10 East, 418; 3 Kent, Comm. 59.

(x) *Williamson v. Wilson*, 1 Bland, 418; *Gowan v. Jeffries*, 2 Ash. 305, and cases cited *supra*.

(y) The insolvency of a partnership does not *per se* dissolve it. *Arnold v.*

Brown, 24 Pick. 93. *Morton, J.* "It is further contended for the plaintiffs that the partnership was dissolved. There is no pretence that the partners *intended* to dissolve the partnership. If it was done at all by them it was the effect of their acts against their intentions. The insolvency of one or both the partners, we think, would not produce this effect. The insolvency of one might furnish to the other sufficient ground for declaring a dissolution. But, in this State, the inability to pay the company or the private debts of the partners would not *per se* operate as a dissolution. In England, bankruptcy, and in some of our States, where insolvent laws exist, legal insolvency may produce a dissolution. Wherever the one or the other operates to vest the bankrupt's or insolvent's property in assignees, or other ministers of the law, it would produce that effect."

(z) *Griswold v. Waddington*, 15 Johns. 57, 16 Johns. 438. In this case the authorities and principles, governing contracts with persons domiciled in an enemy's country, were fully reviewed by Chancellor Kent in the Court of Errors. *McConnell v. Hector*, 3 B. & P. 113; *Scholefield v. Eichelberger*, 7 Peters, 586. The partnership in such cases will be illegal, notwithstanding one or more partners are resident in a neutral country. *The San Jose Indiano*, 2 Gallis. 268; *The Franklin*, 6 Robinson, (Adm.) 127. And the property of a house of trade established in an enemy's country is condemnable as prize, whatever may be the domicile of the partners. *The Freundschaft*, 4 Wheat. 105; *Story on Part. § 316*.

the partnership, the articles of copartnership may provide for its continuance, by an agreement that the executors, administrators, heirs, or other designated person, shall take the place of a deceased partner. (a)

When a partner dies, the partnership property goes to the survivors for the purpose of settlement, and they have all the power necessary for this purpose, and no more. (b) They

(a) *Wrexham v. Huddleston*, 1 Swanst. 514, note; *Crawshay v. Maule*, 1 Swanst. 520; *Pearce v. Chamberlain*, 2 Ves. Sen. 33; *Balmain v. Shore*, 9 Ves. 500; *Warner v. Cunningham*, 3 Dow, Parl. Cas. 76; *Gratz v. Bayard*, 11 S. & R. 41; *Knapp v. McBride*, 7 Ala. 28. And such express agreement for the continuance of the partnership after the death of one partner is necessary, although the partnership is for a term of years. *Gillespie v. Hamilton*, 3 Madd. 251; *Scholefield v. Eichelberger*, 7 Peters, 586; *Pigott v. Bagley, McClelland & Younge*, 575. It is not a settled question whether stipulations in the articles of partnership, providing for its continuance after the death of a partner for the benefit of the heirs, is binding on them. *Louisiana Bank v. Kenner's Succession*, 1 Louis. (Miller,) 384. But according to Chancellor Kent, "the better opinion is, that they are not anywhere absolutely binding. It is at the option of the representatives, and if they do not consent, the death of the party puts an end to the partnership." 3 Kent, Comm. 57, note; *Pigott v. Bagley, McClelland & Younge*, 569; *Kershaw v. Matthews*, 2 Russ. 62. — A partner too may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner it becomes obligatory; but, in that case, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. *Ex parte Garland*, 10 Ves. 110; *Thompson v. Andrews*, 1 Mylne & Keen, 116; *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Mandeville's Ex'r*, 2 Howard, 560, 576. The court in this case said:—"By the general rule of law every partnership is dissolved by the death of one of the partners. It is true that it is competent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place in virtue of such agreement only, as the

act of the parties, and not by mere operation of law. A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. But then in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress. A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner or executor, or other person carrying on the trade, may be personally responsible for all the debts contracted."

(b) *Ex parte Ruffin*, 6 Ves. 119, 126; *Ex parte Williams*, 11 Ves. 5; *Crawshay v. Collins*, 15 Ves. 218; *Peacock v. Peacock*, 16 Ves. 49, 57; *Harvey v. Crickett*, 5 M. & S. 336; *Barney v. Smith*, 4 H. & J. 495; *Murray v. Mumford*, 6 Cowen, 441; *Washburn v. Goodman*, 17 Pick. 519; *Story on Part.* § 325-329, 344, 346; *Collyer on Part.* § 118. But in *Buckley v. Barber*, 1 E. L. & E. 506, Baron Parke doubts whether surviving partners have a power to sell and give a good legal title to the share of the partnership property be-

are tenants in common with the representatives of the deceased, as to the choses in possession. And they have a lien on them to settle the affairs of the concern, and pay its debts. (*c*)

If the survivors carry on the concern, and enter into new transactions with the partnership funds, they do so at their peril; and the representatives of the deceased may elect to call on them for the capital with a share of the profits, or with interest. (*d*)

A court of equity will interfere and decree a dissolution, upon a case, distinctly made out, of positive and injurious wrong, done by one or more of the partners, against the interest of the firm, (*e*) and when called upon to settle the affairs of a partnership, it will respect any stipulations between the partners as to the mode of settlement. In the absence of such stipulations it will be governed by the last settled account, both as to its result and its method, unless the account be set aside for fraud, actual or constructive, or be open to objection as oppressive and unreasonable. (*f*)

longing to the executors of the deceased, even when they sell in order to pay the debts of the deceased and of themselves, and decides that at all events the survivors have no power to dispose of it otherwise than to pay such debt, certainly not to mortgage it together with their own as a security for a debt principally due from them, and in part only from the deceased.

(*c*) *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 5; Story on Part. § 326.

(*d*) *Brown v. Litton*, 1 P. Wms. 140; *Hammond v. Douglas*, 5 Ves. 539; *Featherstonaugh v. Fenwick*, 17 Ves. 298; *Heathcote v. Hulme*, 1 Jac. & Walk. 122; *Sigourney v. Munn*, 7 Conn. 11; *Booth v. Parks*; *Crawshay v. Collins*, 2

Russ. 345; S. C. 15 Ves. 218; 3 Kent, Comm. 64; Story on Part. § 233, 329, 343; Collyer on Part. § 130, 324, 335, and notes. But a partner appointed receiver is not held as partner to account for profits for partnership money invested in trade. *Whitesides v. Lafferty*, 3 Humph. 150.

(*e*) *Tattersall v. Groote*, 2 Bos. & Pul. 131; *Ex parte* Broome, 1 Rose, 69; *Hamil v. Stokes*, 4 Price, 161; S. C. *Daniel*, 20; *Oldaker v. Lavender*, 6 Sim. 239; *Green v. Barrett*, 1 Sim. 45; *Jones v. Yates*, 9 B. & Cr. 532.

(*f*) *Jackson v. Sedgwick*, 1 Swanst. 460, 469; *Pettyt v. Janeson*, 6 Madd. 146; *Oldaker v. Lavender*, 6 Simons, 239; *Desha v. Sheppard*, 20 Ala. 747; Story on Part. § 349, 206.

SECTION XV.

OF THE RIGHTS OF CREDITORS IN RESPECT TO PARTNERSHIP FUNDS.

The property of a partnership is bound to the payment of the partnership debts, and the right of a private creditor of one copartner to that partner's interest in the property of the firm, is postponed to the right of the partnership creditor. (g) *But difficult questions sometimes arise where the private creditor seeks to attach, or levy upon, the partnership property, or the interest of the indebted partner therein. Where attachment by mesne process exists, such attachment is allowed; but it is generally made subject to the paramount rights of the partnership creditors. (h) And such attachment is de-

(g) *Murrill v. Neill*, 8 How. 414; *Pierce v. Jackson*, 6 Mass. 243; *Tappan v. Blaisdell*, 5 N. H. 190; *Brewster v. Hammett*, 4 Conn. 540; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Douglas v. Winslow*, 20 Maine, 89; *Donelson v. Posey*, 13 Ala. (N. S.) 752; *Filley v. Phelps*, 18 Conn. 294; *Pearson v. Keedy*, 6 B. Monr. 128; *Black v. Bush*, 7 Id. 210; *Glenn v. Gill*, 2 Maryl. 1. And if the partners sell the partnership property for the purpose of paying the private debt of one partner such sale is null and void as to the creditors of the firm. *Ferson v. Monroe*, 1 Foster, 462.

—If the individual partners have no lien on the partnership funds for the payment of partnership liabilities, the creditors of the partnership are entitled to no preference over the creditors of the individual partners in attaching its property. *Rice v. Barnard*, 20 Verm. 479. And this preference is denied to the creditors of the partnership, where there has been a *bonâ fide* sale of the partnership effects without the reservation of a lien. *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Reese v. Bradford*, 13 Ala. 837. See *Smith v. Edwards*, 7 Humph. 106. An assignment by partners of their joint and separate property for the payment of their debts, with preference to certain partnership creditors and certain individual creditors, has been held valid. *Kirby v. Schoonmaker*, 3 Barb. Ch. 46,

50.—In Vermont, the creditors of the partnership, in attaching partnership property, are at law entitled to no preference to creditors of an individual partner. *Reed v. Shepardson*, 2 Verm. 120; *Clark v. Lyman*, 8 Verm. 290. But in equity the partnership effects are pledged to each partner until he is released from all his partnership obligations, and are first chargeable with the claims of the partnership creditors, notwithstanding prior attachments of the separate creditors. *Washburn v. Bank of Bellows Falls*, 19 Verm. 278; *Bardwell v. Perry*, 19 Id. 292.

(h) *Pierce v. Jackson*, 6 Mass. 242. In this case an attachment of partnership property for a partnership debt was held to prevail over a prior attachment of the same property for the separate debt of one of the partners. *Parsons, C.J.* "At common law, a partnership stock belongs to the partnership, and one partner has no interest in it but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe to the firm. Consequently, all the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with

feated by the mere insolvency of the firm, although the partnership creditors *have commenced no action for the recovery of their debts. (i) But where one partner is dormant, the creditor of the other is not then postponed in his attachment of the stock in trade, to a creditor of the same firm who has discovered the dormant partner, and makes him defendant. (j)

his debtor, or on a seizing of the goods on execution." *Phillips v. Bridge*, 11 Id. 249; *Newman v. Bagley*, 16 Pick. 572; *Allen v. Wells*, 22 Pick. 450; *Trowbridge v. Cushman*, 24 Id. 310; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Smith v. Barker*, 1 Fairf. 458; *Douglas v. Winslow*, 20 Maine, 89. *Weston, C. J.* "The interest of each partner is in his portion of the residuum, after all the debts and liabilities of the firm are liquidated and discharged. Equity will not aid the separate creditor, until the partnership claims are first adjusted. And they will interpose to aid the creditors of the firm, when a separate creditor attempts to withdraw funds, in regard to which they have a priority. In this State, and in Massachusetts, a separate creditor may attach the goods of a firm, so far as his debtor has an interest in them, subject to the paramount claims of the creditors of the firm."—*Tappan v. Blaisdell*, 5 N. H. 190. *Richardson, C. J.* "According to the old cases in the courts of law, the separate creditor took the goods of the partners, and sold the share of his debtor, without inquiring what were the rights of the other partners, or what was the real share of each. *Blackhurst v. Clinkard*, 1 Show. 169; 1 Salk. 392; *Comyns's R.* 277. But the true nature of a partnership seems to have been better understood in more modern times, and it is now settled that each partner has a lien on the partnership property, in respect to the balance due to him, and the liabilities he may have incurred on account of the partnership." *Morrison v. Blodgett*, 8 N. H. 238; *Page v. Carpenter*, 10 N. H. 77; *Dow v. Sayward*, 12 Id. 276; *Brewster v. Hammett*, 4 Conn. 540; *Washburn v. The Bank of Bellows Falls*, 19 Verm. 278; *In the Matter of Smith*, 16 Johns. 102; *Robbins v. Cooper*, 6 Johns. Ch. 186. But where a partnership was dissolved, and a creditor of the partnership afterwards took the joint and several note of the individual partners, *held*,

that he could not be regarded as a creditor of the partnership, and entitled to preference as such. *Page v. Carpenter*, 10 N. H. 77.

(i) *Pierce v. Jackson*, 6 Mass. 242; *Fisk v. Herrick*, 6 Id. 271. In the latter case the court said: "Before either partner can rightfully claim to his own use, or for the payment of his own debts, any of the partnership effects, the partnership must be solvent, and he must not be a debtor to it."—*Rice v. Austin*, 17 Id. 206; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Lyndon v. Gorham*, 1 Gall. 368. "The general rule undoubtedly is, that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless, upon such an account, the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent, the same effect follows."

(j) The reason of this exception to the general doctrine is, that the public rely on the personal credit of the ostensible owner, and not on that of the dormant partners. *Lord v. Baldwin*, 6 Pick. 348, 351. "The case before us is that of a dormant partnership, which is necessarily, from its very character, unknown at the time the liability is incurred. All the creditors sold their goods or made their contract with the ostensible, visible partner; they trusted to him personally, and to the goods upon which he was trading, as his. The dormant partner is brought to light by *ex post facto* investigation; and he is made responsible, not because he was trusted, but because he secretly enjoyed the profits of the business. Now in such case, the reason for giving preference to such creditors as may first discover his liability, so that stock ostensibly belonging to the visible partner shall first be applied to the satisfaction of their debts, does not exist." . . . "The question now is, whether, when all the creditors have trusted the man of

But this would seem not to be the case where the first attaching creditor's debt had no reference to the partnership business, and the debt of the second creditor had such reference. (*k*) The same *rule is applied to attachments by trustee process, and to direct attachments. (*l*)

Formerly, both in England and in this country, the principle of moieties prevailed. That is, the private creditor took the proportion of the partnership stock which belonged by numerical division to his debtor. (*m*) But now, both there

business and apparent owner of the goods, any one of them, who is behind the rest in his attachment, shall supplant them and gain priority because he has discovered this concealed liability. At the time the debt was created, he stood upon the same footing with the rest; he trusted John Brown and the goods in his possession; so did they. They have taken possession first of the fund which was held out to the public as the means of credit; and it might be, and probably was in this very case, that the goods attached are the identical goods which they sold to the party sued. There would be then no pretence of equity, and we think not of law, in allowing a preference founded upon no meritorious distinction of circumstances." *French v. Chase*, 6 Greenl. 166. The authority of the two preceding cases is fully affirmed in *Cammack v. Johnson*, 1 Green, Ch. 163. See also *Van Valen v. Russell*, 13 Barb. 590.

(*k*) *Witter v. Richards*, 10 Conn. 37. This case determines that a first attaching creditor, who has dealt with a partner in the course of the business of the partnership, but at the same time in ignorance of its existence, shall not be postponed to subsequent attaching creditors, to whom the dormant partners were known when the business transactions took place, or subsequently disclosed before their attachments, but that he shall be postponed if his claims did not arise from a partnership transaction, while that of the subsequent attaching creditor did. The court distinguish *Lord v. Baldwin* from the case before them, and remark: "The result in that case is perfectly compatible with the decision in this; and it is apparent that the court meant only to decide the case before them; for they say, 'Whether a private creditor of his could seize pro-

perty so situated, and hold it against the ostensible owner, is a question of a very different nature.'" 351. See *Allen v. Dunn*, 15 Maine, 292.

(*l*) *Fisk v. Herrick*, 6 Mass. 271; *Church v. Knox*, 2 Conn. 514; *Barber v. Hartford Bank*, 9 Id. 407; *Lyndon v. Gorham*, 1 Gall. 367; *Mobley v. Lombard*, 7 How. (Miss.) 318.

(*m*) *Heydon v. Heydon*, 1 Salk. 392. "Coleman and Heydon were copartners, and a judgment was against Coleman, and all the goods both of Coleman and Heydon were taken in execution, and it was held by *Holt, C. J.* and the court, that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety. But he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner." *Jacky v. Butler*, 2 Ld. Raym. 871. "Two joint partners are in trade. Judgment was entered against one of them; and, upon a *fiery facias*, all the goods, being undivided, were seized in execution; and upon application to the King's Bench by him against whom the judgment was not, the court held that the sheriff could not sell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution." *Bachurst v. Clinkard*, 1 Show. 173; *Marriott v. Shaw*, 1 Comyns, 277; *The King v. Manning*, 2 Id. 616. "If A., B., and C. are partners, and judgment and execution is sued against A., only his share of the goods can be sold. It is true, the sheriff may seize the whole, because the share of each being undivided, cannot be known; and if he seize more than a third part, he can only sell a third of what is seized, for B. and C. have an equal interest with A. in the

and here, the rule is well settled that if partnership effects can be taken either by attachment or on execution to secure or satisfy the debts of one of the partners, this can be done only to the extent of that partner's interest, and subject to the settlement of all partnership accounts. (n) The levy of execution does not give the creditor a separate possession of the goods. The *indebted partner had no such possession himself; and the levy gives to his creditor only that which the debtor had; and that is a right to call for an account, and then a right to the balance which may be found to belong to him upon a settlement. And it must still be regarded as unsettled, whether a sheriff levying an execution of a separate creditor on a partner's interest, can take any, and if any what, actual possession of the partnership property. (o) Considering the great diversity of authority, and

goods seized; but the sheriff can only sell the part of him against whom the judgment and execution was sued." See *Eddie v. Davidson*, Doug. 650; *Parker v. Pistor*, 3 B. & P. 288; *Wallace v. Patterson*, 2 Har. & McHen. 463; *Lynndon v. Gorham*, 1 Gall. 367; *McCarty v. Emlen*, 2 Dall. 278; *Church v. Knox*, 2 Conn. 514. The same rule is recognized at law in Vermont, but not in equity. *Reed v. Shepardson*, 2 Verm. 120; *Clark v. Lyman*, 8 Id. 290; *Washburn v. Bank of Bellows Falls*, 19 Id. 278.

(n) *Fox v. Hanbury*, Cowp. 445; *Eddie v. Davidson*, Doug. 650; *West v. Skip*, 1 Ves. Sen. 239; *Hankey v. Garratt*, 1 Ves. Jr. 236; *Taylor v. Fields*, 4 Id. 396; *Young v. Keighley*, 15 Ves. 557; *In re Wait*, 1 Jac. & Walk. 608, Lord Eldon; *Dutton v. Morrison*, 17 Ves. 193; *Commercial Bank v. Wilkins*, 9 Greenl. 33; *Doner v. Stauffer*, 1 Penn. 198; *Winston v. Ewing*, 1 Ala. (N. S.) 129; *Story on Part.* § 261; *Collyer*, § 822, note; *Ante*, note (h); *Crane v. French*, 1 Wend 311; *Tappan v. Blaisdell*, 5 N. H. 190; *Burgess v. Atkins*, 5 Blackf. 337, 338. *Dewey, J.* "The general rule of law is, that in levying an execution against one partner for his separate debt, the officer may take possession of all the joint property of the firm, in order to inventory and appraise it. He has no authority to divide it; he can only sell the joint interest of the debtor, whatever it may be, and the

purchaser will stand in the place of the debtor, and hold the same interest in the joint concern which he held."

(o) In *Scrugham v. Carter*, 12 Wend. 131, it was held that replevin does not lie against a sheriff in such a case for taking the property and removing it to a place of safe custody, and the remedy of the other partners is to obtain an order staying proceedings until an account be taken in equity. In *Burrell v. Acker*, 23 Id. 606, he was held authorized to take joint possession, with the other partners, of the partnership property, after the levy and before the sale, but whether he was entitled to exclusive possession was not decided. The subject was fully discussed by Mr. Justice Cowen, in *Phillips v. Cook*, 24 Wend. 389, and it was decided that, on an execution at law against one of two partners, the sheriff might lawfully seize, not merely the moiety, but the *corpus* of the joint estate, or the whole, or so much of the entire partnership effects as might be necessary to satisfy the execution, and deliver the property sold to the purchaser; and if he purchases with notice of the partnership, he takes subject to an account between the partners, and to the equitable claims of the partnership creditors. It has since been held that he is equally subject to an account whether he had such notice or not. *Walsh v. Adams*, 3 Denio, 125. The same cases affirm his power to deliver all the

consequent uncertainty, as to this power of the sheriff, the question seems to call for statutory provisions; but in the

goods of the partnership to the purchaser. *Birdseye v. Ray*, 4 Hill, 158, affirms *Phillips v. Cook*, so far as it relates to the seizure of the whole of the joint estate by the sheriff on an execution against one partner for his separate debt. But the sheriff subjects himself to an action if he sells the entire property in the goods of the copartnership or any thing more than the debtor partner's interest in them. *Waddell v. Cook*, 2 Hill, 47, and note; *Walsh v. Adams*, 3 Denio, 125.—In New York, it is held that neither a court of law nor of equity will stay execution at law against the joint estate for a separate debt until an account be taken. *Moody v. Payne*, 2 Johns. Ch. 548; *In re Smith*, 16 Johns. 106, note; *Phillips v. Cook*, 24 Wend. 389. See *Réed v. Howard*, 2 Met. 36. But this rule has been disapproved. *Cammack v. Johnson*, 1 Green. Ch. 168.—In Alabama, the sheriff is held justified in taking exclusive possession of the goods of the firm until the aid of a court of equity is successfully invoked. *Moore v. Sample*, 3 Ala. (N. S.) 319.—In New Hampshire, the right of the sheriff to take possession of partnership property, levied on for the private debt of a partner, has been denied after an elaborate examination of the question. *Gibson v. Stevens*, 7 N.H. 352, 357. *Parker, J.* "The specific property of a partnership cannot be lawfully taken and sold to satisfy the private debt of one of the partners. His creditor can have no greater right than the debtor himself has individually, which is a right to a share of the surplus. This is the necessary result of the doctrine, that the partnership property is a fund in the first place for the payment of the partnership debts, and that the interest of an individual partner is only his share of the surplus. 5 N.H. 192, 193, 250; 9 Conn. 410. There are difficulties in selling the interest of one partner upon an execution. Courts of equity first direct an account, which courts of law cannot do; and if the interest of one partner may be sold upon an execution at law, it must be left to an account afterwards. *Gow* on Part. 246 *et seq.*, 254. And a question may arise in such case, whether the sale operates as a dissolution of the partnership be-

fore the time limited by the articles of copartnership, or whether the other partners are authorized to carry on the trade, and account at the expiration of the term. If the sheriff can sell only the interest of the partner, and not the goods, he must be liable, if he make actual seizure of the specific property, either to the partnership or the other partners. *Wilson v. Conine*, 2 Johns. 280. Especially, if he sell the whole, as in this case. 1 Gall. 370; 15 Mass. 82." *Morrison v. Blodgett*, 8 N. H. 238. *Parker, J.* "If the sheriff cannot sell an interest in specified portions of the goods of the partnership, there seems to be no reason why he should levy upon those goods, and deliver them to the vendee, or why he should in fact reduce them into possession. If 'in truth the sale does not transfer any part of the joint property so as to entitle him.' (the vendee) 'to take it from the other partner,' (1 Story's Eq. 626,) on what principle is the sheriff authorized to seize and hold to the exclusion of the other partners, what his vendee, after a sale of the interest of the debtor is perfected, cannot take from them? If the sheriff sells 'only the interest of such partner, and not the effects themselves,' (1 Wightwick's Ex. R. 50, cited 2 Johns. Ch. 549,) upon what ground shall he seize the effects which he is not to sell? If 'the creditors of the partnership have a preference to be paid their debts out of the partnership funds before the private creditors of either of the partners,' and this 'is worked out through the equity of the partners over the whole funds,' (1 Story's Eq. 625,) that equity should prevent them from being deprived of the means of payment by reason of such seizure by the sheriff, who can neither sell the goods, nor pay the creditors, and against whom they cannot proceed, so long as he may lawfully hold the goods." . . . "In *Smith's* case, 16 Johns. 106, the court after saying that the separate creditor takes the share of his debtor in the same manner as the debtor himself had it, and subject to the rights of the other partner, add, 'The sheriff therefore does not seize the partnership effects themselves, for the other partner has a right to retain them for the payment of the partnership debts.' And in *Cram v.*

absence of such provisions, and on general principles, it would seem that the sheriff cannot take or give, by sale, specific possession of the partnership property. He takes and can sell only the right and interest of the indebted partner to and in the whole fund.

Different rules and modes of practice prevail in different parts of this country. But wherever it can be done, the better and safer way would probably be for the writ to be a trustee process, or in the nature of a foreign attachment, and this should be served on the other partners as alleged trustees, and a return made by the sheriff that he had attached all the * right and interest of the partner defendant in the stock and property of the partnership. So, after sale on execution, the sheriff should convey to the purchaser all the right and interest of the indebted partner in the stock and property of the partnership. And the purchaser would then have the right to demand an account, and a transfer to him of whatever balance or property would, upon such account, have belonged to his debtor, and perhaps, have the same right of possession. (*p*)

French, 1 Wend. 313, Chief Justice Savage, after considering the subject, says: 'The sheriff therefore sells the mere right and title to the partnership property, but does not deliver possession.' Vide also 5 N. H. 193; 2 Conn. 516, 517. The conclusion that the sheriff, upon an execution against one partner, is not to deliver to his vendee, and is not to seize the partnership effects, is sustained, therefore, not only by the reason of the thing, after the adoption of the general principle before stated, but by express authority." The doctrine of these cases is affirmed in *Page v. Carpenter*, 10 N. H. 77; *Dow v. Sayward*, 12 Id. 271, 14 Id. 9. See *Taylor v. Field*, 4 Ves. 396; *Johnson v. Evans*, 7 M. & G. 240, 249, 250, *Tindal*, C. J.; *Collyer* on Part. B. iii. ch. vi. sect. 10.—In *Newman v. Bean*, 1 Foster, 93, it was held, that an action might be maintained against a third person who seizes goods on execution belonging to a partnership, for the debt of an individual partner, and excludes the other partners from the possession of them. See on this subject 26 Amer. Jurist, Art. 3.

(*p*) *Morrison v. Blodgett*, 8 N. H. 254. *Parker*, J. "Whether, under our pre-

sent laws, the creditor can do more than return a general attachment of the interest of his debtor in the partnership, and summon the other partners as his trustees; and what are the effects of such a service upon the rights and duties of the other partners, and, of course, upon the action of the debtor himself? Whether it can suspend his right to interfere with the partnership property, so long as the attachment exists, or whether he may proceed to act as partner until judgment and sale upon execution? And whether, after an attachment, the creditor of any of the partners may maintain a bill in equity for an account before a seizure and sale of the interest of the debtor on the execution? are questions which may arise, but upon which this case does not call for an opinion."—*Dow v. Sayward*, 12 N. H. 276. *Upham*, J. "In the case of *Morrison v. Blodgett*, is a very elaborate examination of this question by Mr. Chief Justice Parker, and the opinion of the court is strongly intimated that a general attachment of the interest of a partner in a firm may be made, though it is suggested that, in order to make the attachment available, by obtaining a true

That the private creditors of one of the partners cannot reach the partnership funds until the claims of the partnership *creditors are satisfied, is now the almost universal rule both in courts of law and of equity. But whether the private property of a partner is equally preserved for his private creditors, is not perhaps certain. At law, no such rule seems to be well established. But where the partnership has failed, and the partnership property is held as a fund for the partnership creditors, the justice of holding the private property of individual partners for the exclusive benefit of their private creditors, is obvious. Then each fund would be held separate; the partnership assets for the partnership creditors, and the assets of each partner for his own creditors, and only the balance of each fund, after the special claims upon it were discharged, would be applicable to the claims of the other class. (q)

knowledge of the extent of the partnership interest, it might be expedient or necessary to summon the other parties as trustees. We are unable now to see any better course than was there suggested. There seems to be no good reason for giving up the process of attachment at law in such cases, as it would probably in this mode be rendered equally as effectual and prompt as any other means of securing the interest of the debtor that might be devised. If a process in chancery should be deemed more effectual, still it might be desirable also to retain a right of attachment at law. See also *Page v. Carpenter*, 10 N. H. 77." S. C. 14 N. H. 9, 12. *Parker, C. J.* "Neither will the fact that the interest of a partner is of a nature that is incapable of actual seizure, and of a reduction into possession, exempt it from a seizure and sale upon execution. Equities of redemption and other interests are of that character, but are nevertheless subject to an execution at law. It follows, then, that the interest of the defendant in the property of the stage company was liable to attachment. Whatever may be the subject of levy and sale, may be the subject of attachment. It is true that there is difficulty in securing the interest of one partner by attachment, so that he or his partners, through their right to hold the property, may not impair the security. This subject was adverted to

in *Morrison v. Blodgett*, before cited. Perhaps it cannot be done without some further legislation, unless it be through the aid of chancery by means of an injunction. But the difficulty of effectually securing the interest of one partner by an attachment, so that the other partners, or the debtor himself, cannot, through the right of the other partners to retain possession of the property, impair the security, by no means proves that such interest is not attachable. It may, notwithstanding, be attached, and the creditor will thereby gain a prior right to have it applied in satisfaction of his judgment. And should the debtor or his partners attempt to avoid the effect of the attachment, the creditor may, perhaps, on application to this court, obtain an injunction to restrain them from any acts inconsistent with his right to have the interest of his debtor sold upon the execution." 12, 13.

(q) In the time of Lord Hardwicke joint creditors were allowed in bankruptcy to prove their debts under a separate commission against one partner, or under separate commissions against all the partners, but only for the purpose of assenting to or dissenting from the certificate, and were considered to have an equitable right to the surplus of the separate estate, after payment of the separate creditors. *Ex parte Baudier*, 1 Atk. 98; *Ex parte Voguel*, 1 Atk. 132; *Ex parte Oldknow*, Co. B. L. ch.

The rights of partnership creditors to a preference in the distribution of the partnership property must not be taken to

6, sect. 15; *Ex parte* Cobham, Co. B. L. ch. 6, sect. 15. See *Dutton v. Morrison*, 17 Ves. 207; *Ex parte* Farlow, 1 Rose, 422. Lord Thurlow broke in upon this rule, allowing joint creditors to prove and take dividends under a separate commission, and holding that a commission of bankruptcy was an execution for all the creditors, and that no distinction ought to be made between joint and separate debts, but that they ought to be paid ratably out of the bankrupt's property. *Ex parte* Haydon, Co. B. L. ch. 6, sect. 15; S. C. 1 Bro. C. C. 453; *Ex parte* Copland, Co. B. L. ch. 6, sect. 15; S. C. 1 Cox, 429; *Ex parte* Hodgson, 2 Bro. C. C. 5; *Ex parte* Page, 2 Bro. C. C. 119; *Ex parte* Flintum, 2 Bro. C. C. 120. Lord Rosslyn restored the principle of Lord Hardwicke's rule, (*Ex parte* Elton, 3 Ves. 238; *Ex parte* Abell, 4 Ves. 837,) which was adopted by Lord Eldon less out of regard to the reason of the rule itself than for the sake of establishing a uniform practice. *Ex parte* Clay, 6 Ves. 813; *Ex parte* Kensington, 14 Ves. 447; *Ex parte* Taitt, 16 Ves. 193. See his remarks in *Chiswell v. Gray*, 9 Ves. 126; *Barker v. Goodair*, 11 Ves. 86, and such is the English law. Gow on Part. 312. There are, however, three exceptions to this rule; "1st, where a joint creditor is the petitioning creditor under a separate fiat; 2d, where there is no joint estate, and no solvent partner; 3d, where there are no separate debts. In the first case the petitioning creditor, and in the second all the joint creditors, may prove against the separate estate *pari passu* with the separate creditors. In the last case, as there are no separate creditors, the joint creditors will be admitted *pari passu* with each other, upon the separate estate." Collyer on Part. § 923; Story on Part. § 378-382. But see *Emanuel v. Bird*, 19 Ala. 596, and *Cleghorn v. Ins. Bank of Columbus*, 9 Geo. 319. The history of the English rule was reviewed in *Murray v. Murray*, 5 Johns. Ch. 60. It has been adopted by some American courts. *Woddrop v. Ward*, 3 Desaus. 203; *Tunno v. Trezevant*, 2 Desaus. 270; *Hall v. Hall*, 2 McCord, Ch. 302; *McCulloch v. Dashiell*, 1 Harr. & Gill, 96; *Murrill v. Neill*, 8 Howard, 414. See *in re* Marwick,

Daveis, 229; *In re* Warren, Daveis, 320; *Morris v. Morris*, 4 Grattan, 293. In *Jackson v. Cornell*, 1 Sandf. Ch. 348, the Assistant Vice-Chancellor said:—"It is not denied that the rule of equity is uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm; and that the creditors of the later are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing. See *Wilder v. Keeler*, 3 Paige, 167; *Egberts v. Wood*, 3 Paige, 517; *Payne v. Matthews*, 6 Paige, 19; *Hutchinson v. Smith*, 7 Paige, 26; 1 Story's Eq. Jur. § 625, § 675." And it was held in *Jackson v. Cornell* that a general assignment of his separate property made by an insolvent copartner, which prefers the creditors of the firm to the exclusion of his own, is fraudulent and void as to the latter. The English rule has been discarded in Pennsylvania. *Bell v. Newman*, 5 S. & R. 78; *In re* Sperry, 1 Ash. 347. And Lord Thurlow's rule prevails in Connecticut, although the surviving partner be solvent and within the jurisdiction of the court. *Camp v. Grant*, 21 Conn. 41. It has been held in Massachusetts that whatever may be the rule in a court of equity, an attachment of the separate property of a partner for a partnership debt is not defeated at law by a subsequent attachment of the same property for his separate debt.—*Allen v. Wells*, 22 Pick. 450. *Dewey, J.* "It is urged, however, on the part of the defendants, that as this court, as a court of law, have long since recognized the principle that an attachment of the goods of a partnership, by a creditor of one of the partners, is not valid, as against an after attachment by a partnership creditor, it should also adopt the converse of the proposition, giving a like preference to separate creditors in respect to the separate property. But we think that there is a manifest distinction in the two cases. The restriction upon separate creditors, as to partnership property, arises not merely from the nature of the debt attempted to be secured, but also from the situation of the property proposed to be attached. In such a case, a

extend so as to affect a *bonâ fide* transmutation of partnership into private property made prior to or upon a dissolution. While the partnership remains and its business is going on, whether it be in fact solvent or not, any fair distribution of the partnership effects among the members of the firm cannot be disturbed by any equities of creditors of the partnership. (qq)

distinct moiety or other proportion, in certain specific articles of the partnership property, cannot be taken and sold, as one partner has no distinct separate property in the partnership effects. His interest embraces only what remains upon the final adjustment of the partnership concerns. But, on the other hand, a debt due from the copartnership is the debt of each member of the firm, and every individual member is liable to pay the whole amount of the same to the creditor of the firm. In the case of the copartnership, the interest of the debtor is not the right to any specific property, but to a residuum which is uncertain and contingent, while the interest of one partner in his individual property is that of a present absolute interest in the specific property. Each separate member of the copartnership being thus liable for all debts due from the copartnership, and no objection arising from any interference with the rights of others as joint owners, it seems necessarily to follow that his separate property may be well adjudged to be liable to be attached and held to secure a debt due from the copartnership." And in the distribution of the estates of deceased insolvent debtors partnership debts are paid ratably with the private claims. *Sparhawk v. Russell*, 10 Metc. 305. But in New Hampshire the English rule has been adopted in the law, to its fullest extent, and where real estate of one partner was set off on execution for a debt due from the partnership, and afterwards the same land was set off for a separate debt of the same partner, the last levy was held to prevail over the first and to give the legal title. *Jarvis v. Brooks*, 3 Forter, 136.—The conclusion of the Supreme Court of Vermont on this ques-

tion is as follows:—"That a partnership contract imposes precisely the same obligation upon each separate partner that a sole and separate contract does, and that it is not true that, in joint contracts, the creditor looks to the credit of the joint estate, and the separate creditor to that of the separate estate; and that there is no express or implied contract resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively; but that, as the partnership creditors in equity have a prior lien on the partnership funds, chancery will compel them to exhaust that remedy before resorting to the separate estate; but that, beyond this, both sets of creditors stand precisely equal, both at law and in equity." Per *Redfield, J.* *Bardwell v. Perry*, 19 Verm. 292, 303. Mr. Justice Story says of the English rule, "It now stands as much, if not more, upon the general ground of authority, and the maxim *stare decisis*, than upon the ground of any equitable reasoning." Story on Part. § 377. And he says further, "It is not, perhaps, too much to say, that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence," but "should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity." § 382. Chancellor Kent, on the other hand, remarks, "For my part, I am free to confess that I feel no hostility to the rule, and think that it is, upon the whole, reasonable and just." 3 Kent, 65, note.

(qq) *Ex parte Ruffin*, 6 Ves. 119; *Allen v. Center Valley Co.* 21 Conn. 130.

SECTION XVI.

LIMITED PARTNERSHIPS.

This species of partnership has been but recently introduced into this country, but has already been adopted in very many of our States, and promises to be of great utility. (r) We have borrowed it from the continent of Europe, as it is wholly unknown in English practice, and is not recognized by the common law of England. The limited partnerships sometimes spoken of in English cases and text-books, mean * only what may be called joint adventure, or a partnership limited to a particular business.

With us, a limited partnership, or, as it is sometimes called, a special partnership, is a very different thing. The purpose of it is to enable a party to put into the stock of a firm a definite sum of money, and abide a responsibility and share a profit which shall be in proportion to the money thus contributed, and no more. By the common law of partnership, he who had any interest in the stock, and received any proportion of the profits, was a partner, and as such liable *in solido* for the whole debts of the firm. Capitalists were therefore unwilling to place their capital in the stock of a trading company, unless advantages were offered them equivalent to this great risk. Men of business capacity, who had only their skill, industry, and integrity, could not always borrow adequate capital, because they could not give absolute security; and they could not pay as a premium for the risk more than legal interest, because the usury laws prohibited this. But they may now enter into an arrangement with a capitalist, by which they receive from him adequate means for carrying on their business profitably, paying him a fair share of the profits earned by the combination of his capital and their labor, while he runs the risk of losing the capital which is thus earning him a profit, but knows that he can lose no more.

(r) New York, Massachusetts, Rhode Island, Connecticut, Vermont, New Jersey, Pennsylvania, Maryland, South Carolina, Georgia, Alabama, Florida, Mississippi, Indiana, Michigan, Illinois, Kentucky, Virginia.

Partnerships of this kind being, as has been stated, wholly unknown to the common law, are authorized and regulated only by statute. And these statutes differ considerably in the several States. But the provisions are generally to the following effect. First, there must be one or more who are *general* partners, and one or more who are *special* partners; secondly, the names of the special partners do not appear in the firm, nor have they all the powers and duties of active members; thirdly, the sum proposed to be contributed by the special partners must be actually paid in; fourthly, the arrangement must be in writing, specifying the names of the partners, amount paid in, &c., which is to be acknowledged before a magistrate, and then recorded and advertised, in such way as shall give the public distinct knowledge of what it is, * and who they are, that persons dealing with the firm give credit to. Besides these general provisions, others of a more particular nature are sometimes introduced. Thus, in some States, no special partnership may carry on the business of insurance or banking. And there are often special provisions to give greater security to the public and persons dealing with such firms. But for these we must refer the reader to the statutes of the several States.

A special partner, complying with the requirements of the law, cannot be held as personally liable for the debts of the firm; although, of course, the whole amount which he contributes goes into the fund to which the creditors of the firm may look.

There has been as yet very little adjudication of questions which have arisen under these statutes — none of importance, that we are aware of, but those which determine that the special partner must, at his own peril, comply precisely with the requirements of the statutes. Any disregard of them, or want of conformity, although it be accidental and entirely innocent on his part, or any material mistake by another, as by the printer who prints the advertisement, deprives him of the benefit of the statute. He is then a partner at common law, and, as such, liable *in solido* for the whole debts of the firm. (s)

(s) *Hubbard v. Morgan*, U. S. D. C. for N. Y. May, 1839, cited in 3 Kent, [191]

36; *Argall v. Smith*, 3 Denio, 435. In this case, which was decided by the Court of Errors of New York, unanimously, it was held, that the publication of the amount contributed by the special partner as \$5,000, whereas it was \$2,000, left upon him all the liabilities of a general partner. The argument of *Spencer*, Senator, who alone gives the reasons of the decision, turns upon the necessity of a true advertisement; he regards an erroneous advertisement as no advertisement at all. But suppose the error had been the reverse of what it was. Instead of calling the contribu-

tion \$5,000, when it was but \$2,000, if it had called it \$2,000, when it was in fact \$5,000, it might have been well urged, in the absence of all ill-design or personal fault on the part of the special partner, that this error could not mislead the public, or any dealer with the firm to his injury, as it made the grounds of credit less than their actual value, instead of, as in the case at bar, making them more. But even then the necessity of a strict compliance with the provisions of the statute might be sufficient to hold the special partner as a general one.

CHAPTER XIII.

NEW PARTIES BY NOVATION.

THE term *novation* has not been much used in English or American law, but may be found in some late English cases; and the thing itself, or this form of contract, may be found in many cases, both in England and in this country. The word is borrowed from the civil law, where it forms an important topic; and we may find a clear statement of its principles in Pothier's work on Contracts. (*ss*) It is defined thus: a transaction whereby a debtor is discharged from his liability to his original creditor, by contracting a new obligation in favor of a new creditor, by the order of his original creditor. Thus, A. owes B. one thousand dollars; B. owes C. the same sum, and at the request of C. orders A. to pay that sum, when it shall fall due, to C. To this A. consents, and B. discharges A. from all obligation to him. A. thus contracts a new obligation to C., and his original obligation to B. is at an end. By the civil law, any new contract entered into for the purpose and with the effect of dissolving an existing contract was regarded as a novation, and in the above case the civil law would recognize two sorts of contracts of novation; the contract by which A. is discharged from his liability to B. by contracting a new obligation to C., and the novation by which B. would be discharged from his obligation to C. by procuring A. as a new debtor. This distinction has not been preserved in the common law, and the rights and obligations of the parties in both cases are governed by the same rule.

A leading English case on this subject is *Tatlock v. Harris*. (*t*) It will be seen, from the statement of the cases in

(*ss*) Part 3, ch. 2, art. 1.

(*t*) 3 T. R. 174. In this case it was determined that where a bill of exchange was drawn by the defendant and others on the defendant alone, in

favor of a fictitious person, (which was known to all parties concerned in drawing the bill,) and the defendant received the value of it from the second indorser, a *bonâ fide* holder for valuable consider-

the note, that the principle deducible from them is, that if A. owes B., and B. owes C., and it is agreed by these three parties that A. shall pay this debt to C., and A. is by this agreement discharged from his debt to B., and B. is also discharged from his debt to C., then there is an obligation created from A. to C., and C. may bring an action against A. in his own name. (*tt*)

ation might recover the amount of it in an action against the acceptor for money paid, or money had and received; and *Buller, J.*, puts this case:—"Suppose A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover that sum against A."—So in *Wilson v. Coupland*, 5 Barn. & Ald. 228, where the plaintiffs were creditors and the defendants were debtors to the firm of "T. & Co.," and, *by consent of all parties*, an arrangement was made that the defendants should pay to the plaintiffs the debt due from them to "T. & Co.," it was held, that as the demand of "T. & Co.," on the defendants was for money had and received, the plaintiffs might recover against the defendants on a count for money had and received, *Best, J.*, saying, "A chose in action is not assignable without the consent of all parties. But here all parties have assented, and from the moment of the assent of the defendants it seems to me that the sum due from the defendants to "T. & Co." became money had and received to the use of the plaintiffs." The case of *Heaton v. Angier*, 7 New Hamp. 397, furnishes an excellent illustration of this principle. That was an action of assumpsit for a wagon sold and delivered. The defendant, having bought the wagon of the plaintiff at auction, sold it immediately afterwards on the same day to one John Chase. Chase and the defendant then went to the plaintiff, and Chase agreed to pay the price of the wagon to the plaintiff for the defendant, and the plaintiff agreed to take Chase as paymaster. *Held*, that the debt due from the defendant to the plaintiff was extinguished. *Green, J.*, having cited the case put by *Buller* in *Tatlock v. Harris*, said:—"The case put by *Buller* is the very case now before us. *Heaton, Angier*, and Chase being together, it was agreed between them that the plaintiff should

take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon." See also *Thompson v. Percival*, 5 Barn. & Ad. 925, 3 N. & M. 171.—And in such case the defendant's undertaking is not to pay the debt of a third person within the meaning of the statute of frauds. *Bird v. Gammon*, 3 Bing. N. C. 883; *Meert v. Moessard*, 1 Moore & Payne, 8; *Arnold v. Lyman*, 17 Mass. 400; *French v. French*, 2 M. & Gr. 644, 3 Scott N. R. 125.

(*tt*) So if in such case the promise of A. to pay C. is conditional, as to pay whatever may hereafter be found due from A. to B., and after such amount is ascertained, but before it is paid, B. becomes bankrupt, still C. may sue A. for the amount of A.'s debt to B. *Crowfoot v. Gurney*, 9 Bing. 372. See also *Hodgson v. Anderson*, 3 B. & C. 842.—It is to be borne in mind that in order to constitute an assignment of a debt or a novation, so as to enable the transferee to bring an action in his own name in a court of law, the assent of the debtor to the agreed transfer is absolutely essential, and there must be a promise founded on sufficient consideration to pay it to the transferee. In equity, however, it is otherwise, and there need be no promise by the debtor to the assignee in order to entitle him to sue in his own name. *Lord Eldon* in *Ex parte South*, 3 Swanst. 392; *Tibbits v. George*, 5 Ad. & Ell. 115, 116; *Robbins v. Bacon*, 3 Greenl. R. (2d ed.) 346, and note; *Blin v. Pierce*, 20 Verm. 25; *L'Estrange v. L'Estrange*, 1 E. L. & E. 153, and note; *Van Buskirk v. Hartford Fire Ins. Co.* 14 Conn. 141; *Mandeville v. Welch*, 5 Wheaton, 277; *Gibson v. Cooke*, 20 Pick. 15.

This would certainly seem to be in contradiction or exception to the ancient rule, that a personal contract cannot be assigned so as to give the assignee a right of action in his own name. But it is not so much an exception as a different thing. It is the case of a new contract formed and a former contract dissolved. And the general principles in relation to *consideration* attach to the whole transaction. (*u*) Thus, to *give to the transaction its full legal efficacy, the original liabilities must be extinguished. For if the debt from A. to B. be not discharged by A.'s promise to pay it to C., then there is no consideration for this promise, and no action can be maintained upon it; (*v*) but, if this liability be discharged,

(*u*) Thus in order that an assignment of a chose in action should be valid against the creditors of the assignor, it must be *bonâ fide* and upon adequate consideration. *Langley v. Berry*, 14 New Hamp. 82; *Giddings v. Coleman*, 12 New Hamp. 153. The assignment, however, need not, although in writing, express to be for value received. *Johnson v. Thayer*, 17 Maine, 401; *Legro v. Staples*, 16 Maine, 252; *Adams v. Robinson*, 1 Pick. 461. It is sufficient if it be so in point of fact; and this must be proved *aliunde* than from the face of the paper. *Langley v. Berry*, *supra*.

(*v*) *Cuxon v. Chadley*, 3 B. & C. 591; *Butterfield v. Hartshorn*, 7 New Hamp. 345. This was an action of assumpsit for money had and received. The plaintiff held a claim against the estate of a person deceased. The executor of the estate sold a farm belonging thereto to the defendant, and left in the defendant's hands a portion of the purchase-money to pay the plaintiff and other creditors their demands against the estate, which the defendant promised the executor to pay. This action was brought to recover the amount of the plaintiff's demand. *Held*, that he could not recover. *Upham, J.* "The principal question in this case is, whether the plaintiff can avail himself of the promise made by the defendant to the executor—he never having agreed to accept the defendant as his debtor, nor having made any demand of him for the money prior to the commencement of this suit. . . . In cases of this kind, a contract, in order

to be binding, must be mutual to all concerned; and until it is completed by the assent of all interested it is liable to be defeated, and the money deposited countermanded. It seems, also, to be clear, that no contract of the kind here attempted to be entered into can be made, without an entire change of the original rights and liabilities of the parties to it. There is to be a deposit of money for the payment of a prior debt, an agreement to hold the money for this purpose, and an agreement on the part of a third person to accept it in compliance with this arrangement. It is made through the agency of three individuals, for the purpose of payment; and it can have no other effect than to extinguish the original debt, and create a new liability of debtor and creditor betwixt the person holding the money and the individual who is to receive it. On any other supposition there would be a duplicate liability for the same debt; and the deposit, instead of being a payment, would be a mere collateral security, which is totally different from the avowed object of the parties. To entitle the plaintiff to recover, there must be an extinguishment of the original debt; and it is questionable whether, in cases of this kind, any thing can operate as an extinguishment of the original debt, but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim." See also *Warren v. Batchelder*, 15 N. H. 129.—*Wharton v. Walker*, 4 B. & C. 163. In this case A. being indebted to B., gave

then it is a sufficient consideration; and if at the same time C. gives up his claim on B. as the ground on which B. orders A. to pay C., then the consideration for which A. promises to pay C. may be considered as moving from C. An order addressed by a creditor to his debtor, directing him to pay the debt to some one to whom the creditor is indebted, operates as a substitution of the new debt for the old one, when it is presented to the debtor, and assented to by him, and not before; and also provided this third party gives up his original claim against the first creditor, and not otherwise. (w) The mutual assent of all the three parties is necessary to make it an effectual novation, or substitution; for so long as the debtor has made no promise, or come under no obligation to the party in whose favor the order is given, it is a mere mandate, which the creditor may revoke at his pleasure. (x) And

him an order upon C., who was A.'s tenant, to pay B. the amount that should be due from C. to A., from the next rent. B. sent the order to the tenant C., but had not any direct communication with him upon the subject. At the next rent-day C. produced the order to A., and promised him to pay the amount to B., and upon receiving the difference between the amount of the order and the whole rent then due, A. gave C. a receipt for the whole. B. afterwards sued C. to recover the amount of the order, in an action for money had and received, and upon an account stated. It was held by the whole Court of King's Bench that he could not recover on either count, because the debt from A. to B. was not extinguished, *Bayley, J.*, saying, "If, by an agreement between the three parties, the plaintiff had undertaken to look to the defendant, and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on such agreement; but in order to give him that right of action there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue A., and this brings the case within *Cuxon v. Chadley*, 3 B. & C. 591." See also *French v. French*, 2 M. & Gr. 644, 3

Scott, N. R. 125; *Thomas v. Schillibeer*, 1 Mees. & Welsb. 124; *Moore v. Hill*, 2 Peake. 10; *Maxwell v. Jameson*, 2 B. & Ald. 55; *Short v. City of New Orleans*, 4 Louis. Ann. 281; *McKinney v. Alvis*, 14 Ill. 34.

(w) *Ford v. Adams*, 2 Barbour, Sup. Ct. 349. Where a declaration alleged that one J. S., being indebted to the plaintiff, made and delivered to him his order in writing, directed to the defendant, to deliver to the plaintiff or bearer a certain quantity of wood; and that the defendant, being indebted to J. S., in consideration thereof accepted the said order, and promised to deliver the wood, according to the tenor and effect of such order and the acceptance thereof; *Held*, on demurrer, that the defendant's acceptance of the order, and his promise to deliver the wood, were without any consideration, and therefore void; and that the plaintiff could not maintain an action against him thereon.

(x) *Owen v. Bowen*, 4 Carr. & Payne, 93. In this case A. gave a sum of money into the hands of B., to pay to C., but B. had not paid it over. It was *held*, that if C. had not consented to receive this sum of B., A. might countermand the authority and recover it back from B. See also *Gibson v. Minet*, 1 Carr. & Payne, 247.

if the person in whose favor the order is drawn has in consideration thereof discharged the debt due to him, and so may hold this order as against the creditor giving it, still it is not a novation. He must sue in the name of the party drawing the order, unless the person on whom it is made has agreed with him in whose favor it is made to comply with the order. (y) *And if the action is brought in the name of the original creditor, it is subject to the equitable defences which may exist between him and the debtor. But after such assent or agreement is given, then the order is irrevocable, and neither party can recede from the agreement. (z) The old debt is entirely discharged.

It will be seen, therefore, that in such case the debtor does not undertake to pay the debt of another, but contracts an entirely new debt of his own, the consideration of which is the absolute discharge of the old debt. Consequently this new promise is not within the provisions of the Statute of Frauds, relating to a promise to pay the debt of another. (a)

There is one point upon which some uncertainty exists as to the principles of the civil law concerning novation, but upon which the rule of the common law is clear. If the order be for less than the whole debt due from him on whom it is

(y) The agreement of *all* parties is absolutely essential to complete this contract, and unless there is a promise by the debtor to pay the new substituted creditor the amount for which he was originally liable to his own creditor, there is no privity of contract, and an action at law will not lie by the transferee in his own name. *Williams v. Everett*, 14 East, 582; *Mandeville v. Welch*, 5 Wheaton, 277; *Gibson v. Cooke*, 20 Pick. 18. See *Wharton v. Walker*, 4 B. & C. 163; *Scott v. Porcher*, 3 Mer. 652; *Wedlake v. Hurley*, 1 Cro. & Jer. 83; *Baron v. Husband*, 4 Barn. & Ad. 614. But see *Hall v. Marston*, 17 Mass. 575. — And the creditor must also consent to take the new debtor as his sole security, and to extinguish his claim against his former debtor. *Butterfield v. Hartshorn*, 7 New Hamp. 345.

(z) See *Ainslie v. Boynton*, 2 Barb.

Sup. Ct. 258; *Hodges v. Eastman*, 12 Verm. 358; *Sirtees v. Hubbard*, 4 Esp. 203. In this case *Lord Ellenborough* observed: — “Choses in action generally are not assignable. Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent; he may have an account against the assignor, and wish to have his set-off; but if there is any thing like an assent on the part of the holder of the money, in that case I think that this, [assumpsit for money had and received,] which is an equitable action, is maintainable.” *Beecker v. Beecker*, 7 Johns. 103; *Holly v. Rathbone*, 8 Johns. 149; *Norris v. Hall*, 18 Maine, 332; *Clement v. Clement*, 8 N. H. 472.

(a) *Bird v. Gammon*, 3 Bing. N. C. 883.

made to the maker, it seems not to be entirely agreed upon by civilians whether such an order, assented to and complied with, would or would not discharge the whole of the original debt. But there can be no doubt that by the common law it would be a discharge only *pro tanto*, unless there were a distinct agreement and a valid promise that it should be taken for the whole. (*b*)

(*b*) *Heathcote v. Crookshanks*, 2 T. R. 27; *Fitch v. Sutton*, 5 East, 230; *Pinnel's case*, 5 Co. R. 117; *Cumber v. Wane*, 1 Strange, 426. See also *Sibree v. Tripp*, 15 M. & W. 23, where the case of *Cumber v. Wane* was much discussed, and somewhat qualified. — Neither will an order or draft for part only of a debt due from the drawee to the drawer, without the consent of the

drawee, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignee for the whole or any part of the sum due from the debtor. *Gibson v. Cooke*, 20 Pick. 15; *Mandeville v. Welch*, 5 Wheaton, 277; *Robbins v. Bacon*, 3 Greenl. 346, (2d ed.) and note.

CHAPTER XIV.

NEW PARTIES BY ASSIGNMENT.

Sect. I. — *Of Assignments of Choses in Action.*

ANY right under a contract, either express or implied, which has not been reduced to *possession*, is a chose in *action*; (c) and is so called because it can be enforced against an adverse party only by an action at law. At common law the transfer of this chose in action was entirely forbidden. The reason was this. A chose in action, by its very nature and definition, is a right which cannot be enforced against a reluctant party, excepting by an action, or suit at law. And if this be transferred, the only thing which passes is a right to go to law; and so much did the ancient law abhor litigation that such transfers were wholly prohibited. (d)

(c) 2 Bl. Com. 396, 397; 1 Dane's Abr. 92. *Choses in action* are not limited, however, to rights arising under contracts. "Blackstone seems to have entertained the opinion, that the term *chose*, or thing in action, only included debts due, or damages recoverable for the breach of a contract, express or implied. But this definition is too limited. The term *chose in action* is used in contradistinction to *chose in possession*. It includes all rights to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract, express or implied. In both cases the debt or damages of the owner is a 'thing in action.'" Per *Bronson*, C. J., *Gillet v. Fairchild*, 4 Denio, 80. It was accordingly held in that case that a receiver of an insolvent corporation, who was empowered by law to sue for and recover "all the estate, debts, and *things in action*," belonging to the corporation, might maintain *trover* for the conversion

of the personal property of the corporation before the plaintiff was appointed receiver. See also *Hall v. Robinson*, 2 Comst. 293.

(d) "It is to be observed, that by the ancient maxim of the common law, a right of entry or a chose in action cannot be granted or transferred to a stranger, and thereby is avoided great oppression, injury, and injustice." Co. Litt. 266, a. So again in *Lampet's case*, 10 Co. R. 48, *Lord Coke* says:—"The great wisdom and policy of the sages and founders of our law have provided, that no possibility, right, title, nor *thing in action*, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of *terre-tenants*, and the subversion of the due and equal execution of justice." At what time this doctrine, which, it is said, had relation originally only to *landed estates*, was first adjudged to be equally applicable to the assignment of a mere *personal chattel not in possession*, it is not easy to

Courts of equity have for a long time, disregarded this rule; (e) and they permit the assignee of a chose in action to sustain an action in his own name. (f) Such an assign-

decide; it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text-writers, and the reports contain numberless observations and cases on the subject. *Chitty & Hulme on Bills*, p. 6. — But it is to be observed that the king was always an exception to this rule, for he might always either grant or receive a possibility or chose in action by assignment. *Breverton's case*, *Dyer*, 30, b; *Co. Litt.* 232, b, note 1. And it seems that in this country the same exception exists in respect to the government of the United States. *United States v. Buford*, 3 Pet. 30.

(e) *Anon.* *Freem. Ch. Rep.* 145; *Wright v. Wright*, 1 Ves. Sen. 409; *Warmstrey v. Tanfield*, 1 Ch. Rep. 29; *Row v. Dawson*, 1 Ves. Sen. 331; *Prosser v. Edmonds*, 1 Y. & Col. 481; *Bigelow v. Willson*, 1 Pick. 485, 493; *Dix v. Cobb*, 4 Mass. 508, 511; *Haskell v. Hilton*, 30 Maine, 419; *Miller v. Whittier*, 32 Maine, 203; *Moor v. Veazie*, *Ib.* 342.

(f) This, however, is to be taken with some qualification. It is not to be understood that the assignee of a chose in action may always enforce his claim in a court of equity; but simply that he may proceed in equity in his own name, whenever he is entitled to go into a court of equity at all. It seems to be well settled, however, that the mere fact of one's being the assignee of a chose in action will not entitle him to go into a court of equity at all. His remedy is generally complete at law by a suit in the name of the assignor, and to that he will be left. It is only when the legal remedy is in some manner obstructed or rendered insufficient that a court of equity will interpose. The law was thus laid down by Lord *Hardwick* in *Motteux v. The London Assurance Co.* 1 Atk. 545, 547; by Lord *King* in *Dhege-toft v. The London Assurance Co.*, *Moseley*, 83; and by Sir *Lancelot Shadwell* in *Hammond v. Messenger*. 9 Sim. 327, 332. In this last case the learned Vice-Chancellor said: — "If this case were stripped of all special circumstances, it would be, simply, a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to

sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances." See also *Keys v. Williams*, 3 Y. & Col. 462, 466; and *Rose v. Clarke*, 1 Y. & Col. Ch. Cas. 534, 548. The same doctrine has been distinctly held also in New York; *Carter v. United Ins. Co.* 1 Johns. Ch. 463; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596. And in Maryland; *Gover v. Christie*, 2 Harris & Johns. 67; *Adair v. Winchester*, 7 Gill & Johns. 114. And in Tennessee; *Smiley v. Bell*, *Martin & Yerges*, 378. And in Virginia; *Moseley v. Boush*, 4 Ran. 392. There is no conflict between the case of *Moseley v. Boush* and the case of *Winn v. Bowles*, 6 Munf. 23, an earlier Virginia case. The latter case simply decided that the statute of Virginia, authorizing the assignee of a chose in action to sue in his own name, did not take from the Court of Chancery the jurisdiction which it formerly had. There seems to have been sufficient in this case to give a court of equity jurisdiction consistently with the rule that we have laid down. Mr. Justice Story, indeed, in his Commentaries on Equity Jurisprudence, expresses a somewhat different view upon this subject. After stating the law as laid down in *Hammond v.*

ment is regarded in equity as a declaration of trust, and an authorization to the assignee to reduce the interest to possession. (*g*) But if the assignee be a mere nominal holder, without interest in the thing assigned, then the suit should be brought in the name of the party in interest. (*h*) And there are assignments of choses in action which will not be sustained either in equity or at law, as being against public policy. As by an officer in the army or navy, of his pay, (*i*) or his commission, (*j*) or the salaries of judges, (*k*) or of a mere right to file a bill in equity for a fraud, (*l*) or a right of action for a tort. (*m*) But after the conversion of a chattel, the

Messenger, cited above, he says, § 1057 *a*. — "This doctrine is apparently new, at least in the broad extent in which it is laid down; and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that, wherever an assignee has an equitable right or interest in a debt, or other property, (as the assignee of a debt certainly has,) there a court of equity is the proper forum to enforce it: and he is not to be driven to any circuitry by instituting a suit at law in the name of the person who is possessed of the legal title." He cites no case, however, which appears to conflict with *Hammond* and *Messenger*, except the case of *Townsend v. Carpenter*, 11 Ohio, 21. That case does indeed decide that the mere fact of one's being an assignee of a chose in action will entitle him to enforce his claim in equity. The learned judge, however, does not cite any case in support of his position, and he appears not to have been aware of the weight of authority against him; for he says he knows of no case except *Moseley v. Boush*, cited above, "where it has been held that a court of law, having once declined jurisdiction of a particular subject-matter, and afterwards in an indirect manner entertained it, that a Court of Chancery, to which it appropriately and originally belonged, is therefore deprived of it. The case of the *Ontario Bank v. Mumford*, cited above, which was decided since *Story's Equity* was published, contains a thorough discussion of this subject. The counsel for the plaintiff relied upon *Story's Equity*, but Chancellor *Walworth*, hav-

ing cited with approbation the case of *Hammond v. Messenger* and several of the other cases referred to in this note, reaffirmed to its full extent the doctrine which they contain. "As a general rule," says he, "this court will not entertain a suit brought by the assignee of a debt, or of a chose in action, which is a mere legal demand; but will leave him to his remedy at law by a suit in the name of the assignor. Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, to prevent a failure of justice, he will be allowed to bring a suit here upon a mere legal demand." Such must undoubtedly be considered the true rule upon the subject.

(*g*) *Co. Litt.* 232, b, note 1; *Morrison v. Deaderick*, 10 *Humph.* 342.

(*h*) *Field v. Maghee*, 5 *Paige*, 539; *Rogers v. Traders Insurance Co.* 6 *Paige*, 583.

(*i*) *Stone v. Lidderdale*, 2 *Anst.* 533; *McCarthy v. Goold*, 1 *Ball & B.* 387; *Davis v. Duke of Marlborough*, 1 *Swanst.* 74; *Flarty v. Odum*, 3 *T. R.* 681; *Grenfell v. Dean and Canons of Windsor*, 2 *Beav.* 544.

(*j*) *Collyer v. Fallon*, *Turn. & Rus.* 459.

(*k*) *Lord Kenyon*, *Flarty v. Odum*, 3 *T. R.* 681. But it seems a city officer may lawfully make an assignment of his salary yet to grow due, so as to prevent its attachment upon the trustee process. *Brackett v. Blake & Tr.* 7 *Metc.* 335.

(*l*) *Prosser v. Edmonds*, 1 *Y. & Col.* 481; *Morrison v. Deaderick*, 10 *Humph.* 342.

(*m*) *Gardner v. Adams*, 12 *Wend.*

owner may sell it so as to give the purchaser a right to claim it of the wrongdoer. (*n*)

Courts of law also permit and protect assignments of choses in action, to a certain extent. (*o*) If the debtor assent to the assignment, and promise to pay the assignee, an action may be brought by the assignee in his own name, (*p*) but otherwise he must bring it in the name of the assignor; (*q*) and this rule applies to an assignment of a negotiable bill or note,

297. "In general, it may be affirmed that mere personal *torts*, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment." *Story*, J., *Comegys v. Vasse*, 1 Pet. 193, 213.

(*n*) *Hall v. Robinson*, 2 Comst. 293, overruling *Gardner v. Adams*, so far as the latter conflicts with what is stated in the text. It will be perceived that this case furnishes no exception to the rule that a right of action for a tort cannot be assigned. It merely decides that the owner of a chattel may sell it and convey a good title to it, notwithstanding it has been wrongfully converted, and then the vendee may demand it in his own right; and, upon a refusal to deliver it, bring his action, not for the conversion done to the vendor, but for the conversion done to himself by such refusal.

(*o*) *Buller, J., Master v. Miller*, 4 T. R. 320, 340:—"It is true that formerly the courts of law did not take notice of an equity or trust; for trusts are within the original jurisdiction of a court of equity; but of late years it has been found productive of great expense to send the parties to the other side of the Hall; wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust, why should they not of an equity. It is certainly true that a *chose in action* cannot strictly be assigned; but this court will take notice of a trust, and consider who is beneficially interested." *Aslhurst, J., Winch v. Keeley*, 1 T. R. 619; *Dix v. Cobb*, 4 Mass. 508; *Welch v. Mandeville*, 1 Wheat. 233; *Legh v.*

Legh, 1 B. & P. 447; *Eastman v. Wright*, 6 Pick. 316, 322; *Owings v. Low*, 5 Gill & Johns. 134, 145; *Hickey v. Burt*, 7 Taunt. 48; *Graham v. Gracie*, 13 Q. B. 548.

(*p*) *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Barrett v. Union M. F. Ins. Co.* 7 Cush. 175; *Currier v. Hodgdon*, 3 N. H. 82; *Morse v. Bellows*, 7 N. H. 549, 565. *Moar v. Wright*, 1 Verm. 57; *Bucklin v. Ward*, 7 Verm. 195; *Hodges v. Eastman*, 12 Verm. 358; *Stiles v. Farrar*, 18 Verm. 444; *Smith v. Berry*, 18 Maine, 122; *Warren v. Wheeler*, 21 Maine, 484; *Barger v. Collins*, 7 Harr. & Johns. 213, 219; *Clarke v. Thompson*, 2 Rhode I. 146. Such seems to be the general ruling on this subject. But such a transaction would seem to fall within the law of novation; and the question would be as to the consideration on which the promise of the original debtor to the assignee is founded. Probably it would be held that if A. holds the note of B., payable to C., and assigns this for value to C., and B. assents and promises to pay C., B. is by such transfer released from his promise to A., and this is a sufficient consideration to sustain his promise to C. See *Ford v. Adams*, 2 Barb. Sup. Ct. 349. In *Tibbits v. George*, 5 Ad. & El. 115, Lord Denman said:—"None of the authorities which have been cited show that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very many of the cases there was a writing; and as to express assent it is undoubtedly held that, in order to give an *action at law*, the debtor must consent to the agreed transfer of the debt, and that there must be some *consideration* for his promise to pay it to the transferee."

(*q*) *Jessel v. Williamsburgh Ins. Co.* 3 Hill, 88; *Usher v. De Wolfe*, 13 Mass.

unless it be indorsed by the assignor. (*qq*) And the action brought in the name of the assignor for the benefit of the assignee is open to all equitable defences; but only to those which are equitable. That is, the debtor may make all *defences which he might have made if the suit were for the benefit of the assignor as well as in his name, provided these defences rest upon honest transactions which took place between the debtor and the assignor before the assignment, or after the assignment and before the debtor had notice or knowledge of it. (*r*) And the death of the assignor will not defeat the assignment, but the assignee may bring the action in the name of the executor or administrator of the deceased. (*s*) But if the assignment be in good faith and for valuable consideration, although the action be brought in the name of the assignor, neither his release nor his bankruptcy will defeat it. (*t*) A debt due for goods sold and delivered, and resting for evidence on a book account, may be so assigned, (*u*) or an unliquidated balance of accounts, (*v*) or a contingent debt, (*w*) or a judgment, (*x*) or a bond; but an action on a bond must be in the name of the obligee, although it be made payable expressly to "assigns." (*y*) And it has been held that a grant of a franchise to a town, as the right of fishery, may be the subject of a legal assignment or release, and the assignee or releasee may maintain an action respecting it in his own name. (*z*) But a servant bound by

290; *Coolidge v. Ruggles*, 15 Mass. 387; *Skinner v. Simes*, 14 Mass. 107. See also *supra*, n. (*o*.)

(*qq*) *Frecman v. Perry*, 22 Conn. 617; See also *Hedges v. Sealy*, 9 Barb. 214.

(*r*) *Mangles v. Dixon*, 18 E. L. & E. 82; *Bartlett v. Pearson*, 29 Maine, 9, 15; *Guerry v. Perryman*, 6 Geo. 119; *Wood v. Perry*, 1 Barb. 114, 131; *Commercial Bank v. Colt*, 15 Barb. 506; *Sanborn v. Little*, 3 N. H. 539; *Norton v. Rose*, 2 Wash. 233; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Hacket v. Martin*, 8 Greenl. 77; *Greene v. Darling*, 5 Mason, 201, 214; *Comstock v. Farnum*, 2 Mass. 96; *Wood v. Partridge*, 11 Mass. 488. *McJilton v. Love*, 13 Ill. 486. See *Patterson v. Atherton*, 3 McLean, 147, in which a different doctrine seems to be held, but on very insufficient grounds.

(*s*) *Dawes v. Boylston*, 9 Mass. 337, 346; *Cutts v. Perkins*, 12 Mass. 206. 210.

(*t*) *Dix v. Cobb*, 4 Mass. 508, 511; *Brown v. Maine Bank*, 11 Mass. 153; *Webb v. Steele*, 13 N. H. 230, 236; *Dunklee v. Greenfield Steam Mill Co.* 3 Foster, 245; *Anderson v. Miller*, 7 S. & M. 586; *Parker v. Kelly*, 10 S. & M. 184; *Winch v. Keely*, 1 T. R. 619; *Blin v. Pierce*, 20 Verm. 25; *Blake v. Buchanan*, 22 Verm. 548; *Parsons v. Woodward*, 2 New Jer. 196.

(*u*) *Dix v. Cobb*, 4 Mass. 508.

(*v*) *Crocker v. Whitney*, 10 Mass. 316.

(*w*) *Cutts v. Perkins*, 12 Mass. 206.

(*x*) *Brown v. Maine Bank*, 11 Mass. 153; *Dunn v. Snell*, 15 Mass. 481.

(*y*) *Skinner v. Simes*, 14 Mass. 107.

(*z*) *Watertown v. White*, 13 Mass. 477.

indenture cannot be transferred or assigned by the master to another, because the master has only a personal trust. (a) The right of a mortgagor to redeem his equity of redemption after the same has been taken and sold on execution is assignable *both at law and in equity. (b) The respective interests of a crew of a privateer in a prize cannot be assigned, because, by the statute of the United States, they have no right in or control over the property until it has been libelled, condemned, and sold by the marshal, and the proceeds, after all legal deductions, paid over to the prize agents. (c)

SECTION II.

OF THE MANNER OF ASSIGNMENT.

It was once held that the assignment of an instrument must be of as high a nature as the instrument assigned. (d) But this rule has been very much relaxed, if not overthrown; and indeed it has been determined that the equitable interest in a chose in action may be assigned for a valuable consideration by a mere delivery of the evidence of the contract; and that it is not necessary that the assignment should be in writing. (e) So the equitable interest in a judgment may be assigned by a delivery of the execution. (f) But a mere agreement to assign without any delivery, actual or symbol-

(a) *Hall v. Gardner*, 1 Mass. 172; *Davis v. Coburn*, 8 Mass. 299; *Clement v. Clement*, 8 N. H. 472. *Graham v. Kinder*, 11 B. Mon. 60. So the powers and duties of the testamentary guardian of an infant are a personal trust, which cannot be assigned. *Balch v. Smith*, 12 N. H. 437.

(b) *Bigelow v. Willson*, 1 Pick. 485.

(c) *Usher v. DeWolf*, 13 Mass. 290.

(d) *Perkins v. Parker*, 1 Mass. 117; *Wood v. Partridge*, 11 Mass. 488. In this case, *Parker, C. J.*, said:—"It is uniformly holden, that an assignment of an instrument under seal must be by deed; in other words, that the instrument of transfer must be of as high a nature as the instrument transferred."

(e) "There are cases in the old books

which show that debts and even deeds may be assigned by parol; and we are satisfied that there is no sensible ground upon which a writing shall be held necessary to prove an assignment of a contract, which assignment has been executed by delivery, any more than in the assignment of a personal chattel." Per *Parker, C. J.*, *Jones v. Witter*, 13 Mass. 304. See also *Dunn v. Snell*, 15 Mass. 481; *Vose v. Handy*, 2 Greenl. 322, 334; *Robbins v. Bacon*, 3 Greenl. 346; *Porter v. Ballard*, 26 Maine, 448; *Prescott v. Hull*, 17 Johns. 284, 292; *Ford v. Stuart*, 19 Johns. 342; *Tibbits v. George*, 5 Ad. & El. 107; *Heath v. Hall*, 4 Taunt. 326.

(f) *Dunn v. Snell*, 15 Mass. 481.

ical of the writing evidencing the debt; or an indorsement upon the instrument directing the debtor to pay a portion of the amount due, to a third person, such indorsement being notified to the debtor, but the writing remaining in the hands of the creditor, does not constitute a sufficient assignment. (*ff*)

SECTION III.

OF THE EQUITABLE DEFENCES.

We have seen that an assignee of a chose in action takes it subject to all the equities of defence which exist between *the assignor and the debtor. (*g*) The assignee does not take a legal interest, nor hold what he takes by a legal title; but he holds by an equitable title an equitable interest; and this interest courts of law will protect only so far as the equities of the case permit; and any subsequent assignee is subject to the same equities as his assignor. (*h*) But these equities must be those subsisting at the time when the debtor receives notice of the assignment; for the assignment, with notice, imposes upon the debtor an equitable and moral obligation to pay the money to the assignee. (*i*) But the assignee ought, especially if required, to exhibit the assignment, or satisfactory evidence of it, to the debtor, to make his right certain; although it is enough if the debtor be in good faith informed of it, and has no reason to doubt it. (*j*) And if after the assignment, and previous to such a notice of it, the debtor pays the debt to the assignor, he shall be discharged, because he shall not suffer by the negligence or fault of the assignee. (*k*) And if after assignment and notice the debtor pays the debt to the assignor, and is discharged by him, and

(*ff*) *Whittle v. Skinner*, 23 Verm. 531; *Palmer v. Merrill*, 6 Cush. 282.

(*g*) See *supra*, n. r, p. *196.

(*h*) *Willis v. Twambly*, 13 Mass. 204; *Stocks v. Dobson*, 19 E. L. & E. 96.

(*i*) *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v. Todd*, 12 Mass. 281; *Jones v. Witter*, 13 Mass. 304; *Small*

v. Browder, 11 B. Mon. 212. See also *supra*, n. r, p. *196.

(*j*) *Davenport v. Woodbridge*, 8 Greenl. 17; *Bean v. Simpson*, 16 Maine, 49; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Anderson v. Van Alen*, 12 Johns. 343.

(*k*) *Jones v. Witter*, 13 Mass. 304; *Stocks v. Dobson*, 19 E. L. & E. 96.

the assignee recovers judgment against the assignor for the consideration paid him for the assignment, the assignee may still recover of the debtor the debt assigned, deducting what he actually recovers from the assignor. (*l*) Nor can the debtor set off any demand against the assignor which accrues to him after such assignment and notice, (*m*) but he may any which existed at or before the assignment and notice. (*n*)

SECTION IV.

COVENANTS ANNEXED TO LAND.

A covenant affecting real property, made with a covenantee who possesses a transferable interest therein, is annexed to * the estate, and is transferable at law, passing with the interest in the realty to which it is annexed; (*o*) and it is often called a "covenant running with the land." If such covenants be made by the owner of land who conveys his entire interest to the covenantee, being annexed to the estate, the assignee of that estate may bring his action on the covenants in his own name. (*p*) But the assignee must take the estate which the covenantee has in the land, and no other; nor can he sue upon the covenants if he takes a different estate. (*q*)

(*l*) *Jones v. Witter*, 13 Mass. 304.

(*m*) *Goodwin v. Cunningham*, 12 Mass. 193; *Greene v. Hatch*, 12 Mass. 195; *Jenkins v. Brewster*, 14 Mass. 291; *Philips v. Bank of Lewistown*, 18 Penn. 394; *Conant v. Seneca County Bank*, 1 Ohio State R. 298.

(*n*) *Ainslie v. Boynton*, 2 Barb. Sup. Ct. 258; *Sanborn v. Little*, 3 N. H. 539.

(*o*) "A covenant is real when it doth run in the realty so with the land that he that hath the one, hath or is subject to the other, and so a warranty is called a real covenant." *Shep. Touch.* 161.

(*p*) Thus if A., seized of land in fee, conveys it by deed to B., and covenants with B., his heirs, and assigns, for further assurance, and then B. conveys to C., and C. to D., D. may require A. to make further assurance to him according to the covenant, and on his refusal may maintain an action against him by

the common law. *Middlemore v. Goodale*, 1 Rol. Abr. 521. See also *Campbell v. Lewis*, 3 B. & Ald. 392.

(*q*) He is not in fact an assignee of the covenantee unless he takes the same estate; for an assignment, by the very definition of the word, is "a transfer, or making over to another, of one's whole interest, whatever that interest may be; and an assignment for life or years differs from a lease only in this, that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with his whole property, and the assignee consequently stands in the place of the assignor." 1 *Steph. Com.* 485. There is a difference, however, in this respect, between the estate or interest in the land and the land itself; for there may be an assignment of a part of the land, and the assignee may have his action. This distinction is taken by Lord Coke.

But it is said that the assignee cannot sue upon the covenants unless the estate passes to him; and therefore cannot upon the covenants that the grantor is lawfully seized of the land, and has a good right to convey; for if these be broken no estate passes to the assignee, and being broken before the assignment, they have become personal choses in action, and so not assignable. (r)

*The right to sue for existing breaches does not pass to the assignee,—being mere personal choses in action, (rr)—unless they be continuing breaches. As if there be a covenant to repair, which is broken, and the need of repair remains, and the assignee takes the property in that condition, he may sue on the covenant. (s) But if there be arrears of rent, the

"It is to be observed," says he, "that an assignee of part of the land shall vouch as assignee. As if a man make a feoffment in fee of two acres to one, with warranty to him, his heirs, and assigns, if he make a feoffment of one acre, that feoffee shall vouch as assignee; for there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part. As if a man hath a warranty to him, his heirs, and assigns, and he make a lease for life, or a gift in tail, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee-simple whereunto the warranty is annexed." Co. Litt. 385, a. See also *Holford v. Hatch*, Doug. 183; *Palmer v. Edwards*, Doug. 187, note; *Van Rensselaer v. Gallup*, 5 Denio, 454; *Astor v. Miller*, 2 Paige, 68, 78; *Van Horne v. Crain*, 1 Paige, 455.

(r) This is the established doctrine in this country, and it would seem to be in accordance with the older authorities in England. *Shep. Touch.* 170; *Greenby v. Wilcox*, 2 Johns. 1; *Mitchell v. Warner*, 5 Conn. 497; *Marston v. Hobbs*, 2 Mass. 439; *Ross v. Turner*, 2 English, [Arkansas,] 132; *Fowler v. Poling*, 2 Barb. Sup. Ct. 300; *Thayer v. Clemence*, 22 Pick. 490. Per *Shaw*, C. J. Chancellor Kent says:—"The covenants of seizin, and of a right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land, or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is

executed, and they become choses in action, which are not technically assignable. But the covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction, is necessary to constitute a breach of them. They are, therefore in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees or the purchaser. The distinction taken in the American cases is supported by the general current of English authorities, which assume the principle that covenant does not lie by an assignee for a breach done before his time. On the other hand, it was decided by the K. B., in *Kingdon v. Nottle*, 1 M. & S. 355, 4 Ib. 53, that a covenant of seizin did run with the land, and the assignee might sue on the ground that want of seizin is a continual breach. The reason assigned for this last decision is too refined to be sound. The breach is single, entire, and perfect in the first instance." 4 Comm. 471. The case of *Kingdon v. Nottle* was severely criticized and condemned by the Supreme Court of Connecticut, in *Mitchell v. Warner*, 5 Conn. 497, and it cannot be considered as law in this country.

(rr) *St. Saviours Churchwardens v. Smith*, 3 Burrows, 1271; *Tillotson v. Boyd*, 4 Sandf. 516.

(s) *Mascal's Case*, Moore, 242, 1 Leon. 62; *Vivian v. Campion*, 1 Salk. 141, Lord Raym. 1125; *Sprague v. Baker*, 17 Mass. 586.

breaches of the covenant to pay are each entire, giving a distinct right of action, and on the death of the landlord these arrearages go to the personal representative and not to the heir. (*t*)

Covenants between landlord and tenant, lessee and reversioner, run with the land. If one who owns in fee conveys to another a less estate, such as a term of years, and enters into covenants with the grantee, which relate to the use and value of the property granted, the right of action for a breach of these covenants which the grantee has passes to his assignee, so long as this less estate continues. (*u*) Such are covenants to repair, to grant estovers for repair or for firewood, to keep watercourses in good order, (*v*) or supply with water; (*w*) also covenants for renewal, (*x*) for quiet enjoyment, (*y*) and the usual warranties for quiet possession. (*z*) But if one having no estate in the land grants with covenants of warranty, as no estate passes, and nothing except by estoppel, the assignee cannot sue on these covenants, for a lessee by estoppel cannot pass any thing over. (*a*)

(*t*) *Anon*, Skin. 367; *Midgley v. Love-lace*, Carth. 289, 12 Mod. 46.

(*u*) *Spencer's Case*, 5 Co. R. 17, b.

(*v*) *Holmes v. Buckley*, Prec. Ch. 39, 1 Eq. Ca. Abr. 27, pl. 4.

(*w*) *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*x*) *Roe v. Hayley*, 12 East, 464.

(*y*) *Noke v. Awder*, Cro. Eliz. 436.

(*z*) *Campbell v. Lewis*, 3 B. & Ald. 392.

(*a*) *Noke v. Awder*, Cro. Eliz. 436; *Whitten v. Peacock*, 2 Bing. N. C. 411.

CHAPTER XV.

NEW PARTIES BY INDORSEMENT.

Sect. I. — *Of Negotiable Bills and Notes.*

By the ancient rules of law we have seen that the transfer of *simple* contracts was entirely forbidden. It is usually expressed by the phrase, that a chose in action is not assignable. But bills of exchange and promissory notes, made payable to order, are called negotiable paper; and they may be transferred by indorsement, and the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut off.

It is generally said that the law of bills and notes is exceptional; that they are choses in action, which, by the policy of the law merchant, and to satisfy the necessities of trade and business, are permitted to be assigned as other choses in action cannot be. But the law of negotiable paper may be considered as resting on other grounds. If A. owes B. one hundred dollars, and gives him a promissory note wherein he promises to pay that sum to him, (without any words extending the promise to another,) this note is not negotiable; and if it be assigned it is so under the general rule of law, and is subject in the hands of the assignee to all equitable defences. But if A. in his note promises to pay B. *or his order*, then the original promise is in the alternative, and it is this which makes the note negotiable. The promise is to pay either B. or some one else to whom B. shall direct the payment to be made. And when B. orders the payment to be made to C., then C. may demand it under the original promise. He may say that the promise was made to B., but it was a promise to pay C. as soon as he should come within the condition; that is, as soon as he should become the payee

by order of * B. And then the law merchant extends this somewhat, by saying that the original promise was in fact to pay either to B., or to C. if B. shall order payment made to him, or to any person to whom C. shall order payment made, after B. has ordered the payment made to C. For B. has the right of not merely ordering payment to be made to C., but to C. or his order; and C. has then the same right, and by the continued exercise of this right the transfer may be made to any number of assignees successively, and the last party to whom the note is thus transferred, or the final holder, becomes the person to whom A. promised B. to pay the money, and such holder may sue in his own name upon this promise.

We may find the reasons of the law of negotiable bills and notes in their origin and purpose. By interchange of property, men supply each other's wants and their own at the same time. In the beginning of society this could be done only by actual barter, as it is now among the rudest savages. But very early money was invented as the representative of all property, and as therefore greatly facilitating the exchange of all property, and as measuring its convertible value. The utility of this means enlarged, as the wants of commerce, which grew with civilization, were developed. But, at length, more was needed; it became expedient to take a farther step; and negotiable paper, first bills of exchange and then promissory notes, were introduced into mercantile use, *as the representative of the representative of property*, — that is, as the representative of money. It was possible to make exchanges of large quantities of bulky articles, by the use of money, without much inconvenience; and it was possible for him who wished to part with what he had, to acquire in its stead by selling it for money, an article in which the value of all that he parted with was securely vested, until he had such opportunity as he might wish to place this value in other property, which he did by buying. But still coin was itself a substantial article, not easily moved to great distances in large quantities; and while it adequately represented all property, it failed to represent *credit*. And this new invention was made, and negotiable paper introduced, to extend

this representation another degree. It does not represent property directly, but * money. And as in one form it represents the money into which it is convertible at the pleasure of the holder, so in another form it represents a future payment of money, and then it represents credit. And as names in any number may be written on one instrument, that instrument represents and embodies the credit of one man or the aggregated credit of many. Thus, by this invention, vast amounts of value may change ownership at any distance, and be transmitted as easily as a single coin could be sent. And by the same invention, while property is used in commercial intercourse, the credit which springs from and is due to the possession of that property may also be used at the same time, and in the same way. And all this is possible because negotiable paper is the adequate representative of money, and of actual credit, in the transaction of business. And it is possible therefore only while this paper is such representative, and no longer; and the whole system of the law of negotiable paper has for its object to make this paper in fact such representative, and to secure its prompt and available convertibility, and to provide for the safety of those who use this implement, either by making it or receiving it, in good faith.

By the practice of merchants, the transfer of negotiable paper is made by indorsements. The payee writes his name (*b*) on the back of the bill or note, and delivers it to

(*b*) There can be no indorsement without a signing of the name. *Vincent v. Horlock*, 1 Camp. 442. In this case A., the drawer and payee of a bill of exchange, indorsed the bill in blank to B., who wrote over A.'s signature, "pay the contents to C.," and then delivered it to C. *Held*, that B. was not liable to C. as an indorser of the bill. Lord *Ellenborough* said:—"I am clearly of opinion that this is not an indorsement by the defendant. For such a purpose the name of the party must appear written with intent to indorse. We see these words, "Pay the contents to such a one," written over a blank indorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted. When a

bill is indorsed by the payee in blank, a power is given to the indorsee of specially appointing the payment to be made to a particular individual, and what he does in the exercise of this power is only *expressio eorum, quæ tacite insunt*. This is a sufficient indorsement to the plaintiffs, but not by the defendants." So *Buller, J.*, in *Fenn v. Harrison*, 3 T. R. 761, says:—"In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself,—the acceptor, the drawer, and the indorsers, are all liable in their turns; but they are only liable because they have written their names on the bill."

the purchaser, (*bb*) and is then called an indorser. The purchaser of the note may then write over *this indorsement an order to pay the contents of the note to him or to his order, if the payee has not already written this. The purchaser thus becomes an indorsee. When the name only is written it is called an indorsement in blank, and the holder may transfer it by delivery, and it may thus pass through many hands, the final holder who demands payment writing over the name indorsed an order to pay to him. Whenever this order is written by an indorser, whether a first or later indorser, it is an indorsement in full, and the indorsee cannot transfer the note excepting by his indorsement, which again may be in full or in blank. It is now quite settled that the executor or administrator of a deceased payee may indorse the note of his testator, (*c*) but he has no right to *deliver* to the indorsee a note which was indorsed by the deceased, but never delivered by him. (*cc*) The same rule holds also in the case of an assignee of an insolvent payee. (*d*)

The indorsement of a blank note binds the indorser to any terms as to amount and time of payment which the party to whom he intrusts the paper inserts. (*e*) If the note be originally made payable to "bearer," it is negotiated or transferred by delivery only, and needs no indorsement, (*f*) any person bearing or presenting the note becoming in that case the party to whom the maker of the note promises to pay it. And the holder of negotiable paper, indorsed in blank or made payable to bearer, is presumed to be the owner for

(*bb*) In order to a valid indorsement, the payee or holder must not only write his name on the back, but must deliver the bill to the indorsee. *Emmett v. Tottenham*, 20 E. L. & E. 348; *Sainsbury v. Parkinson*, *Ib.* 351. See also *Hall v. Wilson*, 16 Barb. 548.

(*c*) This question was ably discussed in the case of *Rawlinson v. Stone*, 3 Wils. 1. This was an action upon a promissory note, payable to A. B., or order, and indorsed by the administratrix of A. B. It was objected that the indorsement was not valid so as to give the indorsee an action in his own name. But the objection was overruled; and this case has been considered ever since

as having settled the law upon this point. See *Watkins v. Maule*, 2 Jac. & Walk. 237, 243; *Shaw, C. J.*, *Rand v. Hubbard*, 4 Met. 252, 258.

(*cc*) *Bromage v. Lloyd*, 1 Exch. 31; *Clark v. Sigourney*, 17 Conn. 511; *Clark v. Boyd*, 2 Ham. 279.

(*d*) *Pinkerton v. Marshall*, 2 H. Bl. 334; *Thomason v. Frere*, 10 East, 418.

(*e*) *Montague v. Perkins*, 22 E. L. & E. 516; *Russel v. Langstaffe*, Doug. 514; *Violet v. Patton*, 5 Cranch, 142, 151; *Johnson v. Blasdale*, 1 S. & M. 1; *Torrey v. Fisk*, 10 S. & M. 590; *Smith v. Wyckoff*, 3 Sandf. Ch. 77, 90.

(*f*) *Wilbourn v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451.

consideration. If circumstances cast suspicion on his ownership, as if it came to him from or through one who had stolen it, then he must prove that he gave value for it; and on such proof will be entitled to it, unless it is shown that he was cognizant of the want of title, or had such notice or means of knowledge as made his negligence equivalent to fraud. (*g*)

Strictly speaking, only a payee or one made payee by subsequent indorsement, can become himself an indorser. It is not enough that a name is written on the back of a note or bill, for although this is, literally speaking, an indorsement, whether it be so or not by law and the usage of merchants must depend upon the character of the signer. The effect of a simple signature, without any other words, on the back of a note, by one not the payee, has been much considered and variously decided. From the authorities which we deem entitled to most respect upon this question, and from general principles, we come to these conclusions: If any one not the payee of a negotiable note, or in the case of a note not negotiable, if any party, writes his name on the back of the note at the time it is made, his signature binds him in the same way as if it was on the face of the note and below that of the maker, that is to say, he is held as a joint maker or as a joint and several maker according to the form of the note. (*gg*) If the signature be at a distinctly later period, after the making and delivery of the note, the signer as to the payee is not

(*g*) *Miller v. Race*, 1 Burr. 452; *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, Doug. 633; *Collins v. Martin*, 1 B. & P. 648; *Lawson v. Weston*, 4 Esp. 56; *King v. Milsom*, 2 Camp. 5; *Solomons v. Bank of England*, 13 East, 135, in notis; *Paterson v. Hardacre*, 4 Taunt. 114; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, 3 Johns. Cas. 259; *Thurston v. McKown*, 6 Mass. 428; *Munroe v. Cooper*, 5 Pick. 412; *Wheeler v. Guild*, 20 Pick. 545; *Aldrich v. Warren*, 16 Maine, 465. It is now well settled, overruling the earlier cases, that if the defendant prove a note fraudulent or illegal in its inception this throws the burden on the plaintiff of proving that he paid value. *Smith v. Braine*, 3 E. L. & E. 379;

Bailey v. Bidwell, 13 M. & W. 73; *Case v. Mechanics' Banking Association*, 4 Coms. 166. It is otherwise if the defendant merely show a want of consideration when the note was given. *Middleton Bank v. Jerome*, 18 Conn. 443; *Thompson v. Shepherd*, 12 Metc. 311.

(*gg*) *Campbell v. Butler*, 14 Johns. 349; *Dean v. Hall*, 17 Wend. 214; *Sampson v. Thornton*, 3 Metc. 275; *Union Bank v. Willis*, 8 Metc. 504; *Austin v. Boyd*, 24 Pick. 64; *Bryant v. Eastman*, 7 Cush. 111; *Adams v. Hardy*, 32 Maine, 339; *Martin v. Boyd*, 11 N. H. 385; *Flint v. Day*, 9 Verm. 345; *Bright v. Carpenter*, 9 Ham. (Ohio) 139; *Carroll v. Weld*, 13 Ill. 682. See also *Ellis v. Brown*, 6 Barb. 282.

a maker but a guarantor. (*gh*) His promise is void if without consideration, but the consideration may be the original consideration for the note, if the note was received at his request and upon his promise to guarantee the same, or perhaps if the note was made at his request alone, without the promise, and more certainly if the note was given for his benefit; or the consideration for the guarantee may be a new one moving in some way from the holder. In the last case if the note is not negotiable the party indorsing can be held only as maker or as guarantor, but if the note be negotiable the question might arise whether, although the party signing is only a guarantor as to the payee or party receiving the note from him, he may not be liable to subsequent parties as indorser. For if he be only a guarantor he may make the defence of a want of consideration against any holder, but if indorser, only against his immediate indorsee. This question we should answer by saying that if the payee writes his name over the name of the other, thus making him to all appearances a second indorser, he might be held as such by any subsequent ignorant holder for value, because he has enabled the payee to give his signature this appearance and therefore this effect. And we should go further and consider that he would be liable to any holder even with full notice, because he wrote his name for the purpose of giving the payee his credit, and therefore impliedly authorized the payee to give his suretyship any character perfectly compatible with the manner and place of his signature, so that unless there was a special agreement between the parties that this should not be done, which was also known to the holder, the payee might transfer the note, making the signer a second indorser, and liable as such.

Bills and notes are usually considered together; the law respecting them being in most respects the same. The maker of a note being liable, generally, in the same way as the acceptor of a bill.

(*gh*) Ibid. *Tenney v. Prince*, 4 Pick. 385; *Samson v. Thornton*, 3 Metc. 275.

SECTION II.

OF THE ESSENTIALS OF NEGOTIABLE BILLS AND NOTES.

Promissory notes were made negotiable in England by the statute of 3 & 4 Anne; but it has been doubted there whether a note, payable to the maker's own order, was a negotiable note. (*h*) In this country it is so undoubtedly. In

(*h*) Written securities, in the form of promissory notes, made payable to the maker or his order, and by him indorsed, are an irregular kind of instrument, which has grown into use among merchants since the statute of Anne, and is now extremely common in this country and in England. At what precise time they first came into use, and what was the occasion which gave rise to them, it is impossible to say. Baron Parke, in *Hooper v. Williams*, 2 Exch. 21, characterizes them as "securities in an informal, not to say absurd, form, probably introduced long after the statute of Anne—for what good reason no one can tell—and become of late years exceedingly common." So Chief Justice Wilde, in *Brown v. De Winton*, 6 C. B. 342, said that notes in this form, according to his experience, which extended over a period exceeding forty years,—were very far from uncommon. They seem not to have attracted the attention of courts until a recent date. It has always been the received opinion in this country that instruments in this form were negotiable within the statute of Anne, and that they differed in no material particular from notes in the ordinary form. Such also, according to the observation of eminent counsel, in *Brown v. De Winton*, was the received opinion in England, until the case of *Flight v. Maclean*, 16 M. & W. 51. Since that case, the nature and construction of instruments of this kind have been very learnedly and elaborately discussed by the three principal common-law courts in Westminster Hall. The case of *Flight v. Maclean* came up in the Court of Exchequer, in 1846. The declaration stated that the defendant made his promissory note in writing, and thereby promised to pay to the or-

der of the defendant £500 two months after date, and that the defendant then indorsed the same to the plaintiff. To this there was a special demurrer, assigning for cause, that it was uncertain whether the plaintiff meant to charge the defendant as maker or as indorser of the note, and that a note payable to a man's own order was not a legal instrument, and could not be negotiated. The court sustained the demurrer without much discussion, "on the ground that the instrument in question, made payable to the maker's order, was not a promissory note within the statute of Anne, which requires that a promissory note, to be assignable, shall be made payable by the party making it to some 'other person,' or his order, or unto bearer." During the argument, however, Parke, B. put to the counsel this question:—"Though by the law merchant the note cannot be indorsed, could not the defendant make this a promissory note by indorsing it to another person?" This case was followed the next year in the Queen's Bench by the case of *Wood v. Mytton*, 10 Q. B. 805, in which precisely the same question was presented as in *Flight v. Maclean*, except that in the latter it arose on a *motion in arrest of judgment*, whereas in the former it arose on a *special demurrer*. The question was argued at considerable length, and Lord Denman, after a very minute examination of the statute of Anne, held that the instrument declared on was a promissory note within the terms of the statute, and judgment was given for the plaintiff. It is to be observed, however, that Patteson, J., during the argument of this case, put to the counsel a question similar to that put by Baron Parke in *Flight v. Maclean*. "Whatever," said he, "may be

some of our States there are statutory provisions permitting negotiable paper to be under seal.

the case with respect to a note like this before indorsement, may it not, as soon as it is indorsed, come within the statute, either as a note payable to bearer, if it is indorsed in blank, or as a note payable to the person designated, if it is indorsed in full?" In 1848 the question came up again in the Court of Exchequer, in the case of *Hooper v. Williams*, 2 Exch. 13. The instrument declared on in this case was similar to those in the two former cases, being made payable to the defendant's own order, and by him indorsed in blank. The pleader, however, adopting the suggestion of Mr. Baron Parke and Mr. Justice Patteson, declared as upon a note payable to bearer. At the trial the defendant objected that there was a variance between the note and the declaration, and the case coming before the court in banc upon this objection, *Parke, B.*, in delivering the opinion of the court, said: "It appears to us, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration. This view of the case reconciles the decision of this court in *Flight v. Maclean* with that of the Queen's Bench in *Wood v. Mytton*; but not the reasons given for those decisions. In the case in this court the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was, in substance, good; for it set out an artificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff. The difference between the two courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd form, are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne, and for what good reason no one can tell, has become of late years exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them." Shortly

after the decision in this case, the same question came up in the Common Bench, in the cases of *Brown v. De Winton* and *Gay v. Lander*, 6 C. B. 336. In *Brown v. De Winton* the question came up in the same shape as in *Wood v. Mytton*, and *Coltman, J.*, in giving the judgment of the court, delivered a very able and elaborate opinion, in which he agreed entirely with the view taken by the Court of Exchequer. In *Gay v. Lander*, the question was presented in a little different light. It is a familiar principle in the law of negotiable paper, that when a note is made payable to A. B. or *his order*, the words "*his order*" impart to the note a permanently assignable quality into whose hands soever it may come; so that, though A. B. indorse the note to C. D. specially, without using the words "*or his order*," yet C. D. may indorse it in turn to whomsoever he pleases. The point raised in *Gay v. Lander* was, whether the indorsement should receive the same construction in the case of a note payable to the order of the maker and by him indorsed, and the Court held that it should. *Coltman, J.*, in delivering the opinion, said:—"We think that the principle on which the case of *Brown v. De Winton* was decided, will extend to this case. The principle on which that case was decided is, that the note, before it was indorsed, was in the nature of a promise to pay to the person to whom the maker should afterwards, by indorsement, order the amount to be paid; and that, after the note is indorsed and circulated, it must be taken as against the party so making and indorsing the note, that he intended that his indorsement should have the same effect as the indorsement by the payee of a note payable to the order of a person other than the maker would have had. Now, it is well established that, if a note be made payable to J. S. or order, and J. S., in such case, indorses the note specially to Smith & Co., without adding '*or order*,' Smith & Co. may convey a good title to any other person by indorsement." It might, perhaps, be inferred from what fell from Baron Parke in *Hooper v. Williams*, that he entertained a different opinion on this last point, but the point did not

It is sufficient in law if the maker's name appears in the note; as, "I, A. B., promise, &c." But signature at the bottom is so usual, that the want of it would taint the note with suspicion. (*i*)

As the negotiable bill or note is intended to represent and take the place of money, it must be payable in money, and not in goods; (*j*) and although it has been held in this country that it might be made payable in bank bills which were * universally current as cash, (*k*) the weight of authority and reason is against this, and in favor of the English rule, which requires them to be payable in money. (*l*) The payment must not rest upon any contingency or uncertain event. (*m*)

arise in that case, and probably his attention was not particularly directed to it. In *Absolon v. Marks*, 11 Q. B. 19, the defendant and four others made a joint and several note, payable to their own order and all indorsed it in blank, and upon an action the declaration in which stated that the defendant made his promissory note payable to his own order, and indorsed the same to the plaintiff and promised to pay him the same according to its tenor and effect, Lord *Denman* decided that the note having been indorsed was thereby made certain and a good promissory note under the statute. See also *Woods v. Ridley*, 11 *Humph.* 194; *Wardens, &c., of St. James Church v. Moore*, 1 *Carter (Ind.)* 289.

(*i*) *Taylor v. Dobbins*, 1 *Stra.* 399; *Elliot v. Cooper*, 2 *Lord Raym.* 1376; 3 *Kent's Comm.* 78.

(*j*) *Jerome v. Whitney*, 7 *Johns.* 321; *Thomas v. Roosa*, 7 *Johns.* 461; *Peay v. Pickett*, 1 *Nott & McCord*, 254; *Rhodes v. Lindly*, 3 *Hammond*, 51; *Atkinson v. Manks*, 1 *Cow.* 691, 707; *Clark v. King*, 2 *Mass.* 524; *Bunker v. Athearn*, 35 *Maine*, 364. So the bill or note, in order to be negotiable, must contain a promise for the payment of money *only*, and not for the payment of money and the performance of some other act. *Austin v. Burns*, 16 *Barb.* 643. Therefore, where a note contained a promise to deliver up horses and a wharf, and also to pay money at a particular day, it was held not to be within the statute. *Martin v. Chantry*, 2 *Stra.* 1271. A note, however, need

not contain the words "*promise to pay*," in order to come within the statute; it is sufficient if it contain words which, upon a reasonable construction, import a *promise to pay*. Therefore, where a note contained a promise by the maker to be *accountable to A. or order for 100*l.**, it was held to be within the statute. *Morris v. Lee*, 2 *Ld. Raym.* 1396, 8 *Mod.* 362, 1 *Stra.* 629. And so where the note set forth in the declaration was, "I acknowledge myself to be indebted to A. in —*l.*, to be paid on demand, for value received;" on demurrer to the declaration, the court, after solemn argument, held that this was a good note within the statute, the words "*to be paid*" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent. *Casborne v. Dutton*, *Selw. N. P.* 395. See also *Hyne v. Dewdney*, 11 *E. L. & E.* 400, and note.

(*k*) *Keith v. Jones*, 9 *Johns.* 120; *Judah v. Harris*, 19 *Johns.* 144; *Swetland v. Creigh*, 15 *Ohio*, 118.

(*l*) *McCormick v. Trotter*, 10 *S. & Rawle*, 94; *Gray v. Donahoe*, 4 *Watts*, 400; *Hasbrook v. Palmer*, 2 *McLean*, 10; *Fry v. Rousseau*, 3 *McLean*, 106; *Smith v. Philadelphia Bank*, 14 *Penn. S. R.* 525; 3 *Kent's Comm.* 75.

(*m*) *Alexander v. Thomas*, 2 *E. L. & E.* 286; *Dawkes v. Lord De Lorane*, 3 *Wils.* 207; *Beardesley v. Baldwin*, 2 *Stra.* 1151; *Roberts v. Peake*, 1 *Bur.* 323; *Cook v. Satterlee*, 6 *Cow.* 108; *Van Vacter v. Flack*, 1 *S. & Marsh*, 393; *Palmer v. Pratt*, 9 *Moore*, 358.

Hence a draft on a public officer, as such, is not negotiable, because it is presumably drawn against a contingent public fund. (*n*) But if the event must happen, an uncertainty as to the time of its happening does not prevent the bill or note from being negotiable. (*o*)

Usually bills and notes express the consideration by saying "for value received;" but where this is not expressed it is implied by law, both as to the makers and the acceptors or indorsers of negotiable bills and notes, and this presumption must be rebutted by evidence if the defence rests on want of consideration. (*p*) And the presumption is so far rebutted as to cast the burden of proof on the holder, by evidence making the consideration doubtful. (*pp*)

To a note there need be but two original parties, a maker and a payee. To a bill there are three, drawer, drawee, and payee. The drawee is not bound until acceptance; and then having become the acceptor, he is regarded as primarily the promisor, and the drawer only collaterally; and the drawer is liable in very much the same way as the indorser of a note. We shall treat at this time only of negotiable bills and notes, because it is only they which permit new parties to be introduced by indorsement, who have all the rights of the original parties. Where instruments are not negotiable, third parties may become interested; but, if they are to be regarded as new parties at all, it is only with much qualification.

*SECTION III.

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OF INDORSEMENT.

The indorsement of a bill or note passes no property, unless the indorser had at the time a legal property in the

(*n*) *Reeside v. Knox*, 2 Whart. 233.

(*o*) *Cooke v. Colehan*, 2 Stra. 1217; *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wils. 262; *Dawkes v. Lord Lorane*, 3 Wils. 207, 213. In *Seacord v. Burling*, 5 Denio, 444, it was held that an agreement in writing by which the subscriber to it promised to pay another a sum of money on demand with interest, and added, *but no demand*

is to be made as long as the interest is paid, was not a promissory note.

(*p*) *Hatch v. Traves*, 11 Ad. & Ell. 702; *Grant v. Da Costa*, 3 M. & S. 351; *Benjamin v. Tillman*, 2 McLean, 213; *Bristol v. Warner*, 19 Conn. 7; *Poplewell v. Wilson*, 1 Stra. 264; *Lincs v. Smith*, 4 Florida, 47.

(*pp*) *Delano v. Bartlett*, 6 Cush. 364. But see *Fitch v. Redding*, 4 Sanf. 130.

note. (q) And therefore a married woman cannot indorse a note made payable to her before or during her coverture. (r) Nor does the property in the note pass by indorsement, if the indorsee knew at the time he received it that the indorser had no right to make the transfer. (s) A party receiving a bill or note as agent, or for any particular purpose, and exceeding his authority or violating his duty, may nevertheless pass the property in the note to a *bonâ fide* holder. (t) But *no as-

(q) *Mead v. Young*, 4 Term, 28. In this case it was held that in an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A. or order," it is competent to the defendant to give evidence that the person who indorsed to the plaintiff was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill. The indorsement and delivery must both be made by the person then having the legal interest in the note; and if a note is indorsed by the payee, and retained in his possession, and after his death is delivered by his executor to the person to whom it was indorsed, the title to the note is not thus transferred. *Bromage v. Lloyd*, 1 Exch. R. 31; *Lloyd v. Howard*, 1 E. L. & E. 227, note; *Awde v. Dixon*, 5 E. L. & E. 512; *Prescott v. Brinsley*, 6 Cush. 233; *Clark v. Boyd*, 2 Hammond, 56; *Clark v. Sigourney*, 17 Conn. 511. See also *Bay v. Coddington*, 5 Johns. Ch. 54; *Lawrence v. Stonington Bank*, 6 Conn. 521.

(r) *Savage v. King*, 17 Maine, 301. See *Barlow v. Bishop*, 1 East, 432; *Commonwealth v. Manley*, 12 Pick. 173.

(s) See *Roberts v. Eden*, 1 Bos. & Pul. 398; *Stoddard v. Kimball*, 6 Cush. 470.

(t) Thus where the drawer of a bill of exchange, which had been accepted, wrote his name across the back of it, and delivered it to A. to get it discounted, and A. while the bill was yet running deposited it with B., as security for money advanced to himself, but without any fraud in B., this was held to be a valid indorsement from the drawer to B. *Palmer v. Richards*, 1 E. L. & E. 529. In this case, *Parke*, Baron, said: "I think this was a perfectly good indorsement from Edwards to Tingey. If the allegation in the declaration were that there had been an indorsement of

this bill from Edwards to Brown, it would be a question of fact whether the writing of Edwards's name on the back of the instrument, accompanied by a delivery of it to Brown, meant to transfer the property in the bill to him, so as to enable him to indorse it as his own, or merely to hand it over to another party. As to the case which has been cited of *Lloyd v. Howard*, I think the decision there was perfectly right, and an authority for saying that there was no indorsement from Edwards to Brown; for the mere writing of a man's name on the back of an instrument is not enough for that purpose; it is only one act towards it; and *Lloyd v. Howard* shows that the writing the name and handing the instrument to a third person, without any intention to pass the property in it to that person, is insufficient to constitute an indorsement to that person. But if a man writes his name on the back of a bill of exchange in order that it may be negotiated, and any person afterwards receives it for value, it does not lie in the indorser's mouth to say that the bill was not indorsed to that person; and it has been the established rule ever since the case of *Collins v. Martin*, 1 B. & P. 648, that any person who thus takes a bill for value is the indorsee of it. I think that Edwards, by putting his name on the back of this bill, and putting it into the hands of his agent, with authority to represent him, who hands it over to a third party, ought not to be permitted to say that he did not indorse it to any person who took it for value from his agent. The question, therefore, here is, whether, there being no proof of any fraud in Tingey, he may not be considered a holder of the bill, and Edwards, as having indorsed it to him. The case is distinguishable from *Lloyd v. Howard* in this, that if this bill were indorsed to Brown solely with the view

signee, even for good consideration, can hold the bill or note, if he knew or had direct and sufficient means of knowing that the transfer of the same to him was wrongful or unauthorized. The assignor may have held the bill or note by indorsement to him; and as an indorsement may always be restricted or conditioned at the pleasure of the indorser, the assignor was bound to obey such restriction; and an assignee by indorsement, who knows that the indorsement was made in disregard of such restriction, has no property in the bill or note. (u) If a negotiable bill or note be indorsed for consideration, so that the whole property passes to the indorsee, its negotiable quality passes with it; and it is said that this negotiability cannot be restrained by the indorsement. But where the indorsement is without consideration, and is intended merely to give the indorsee authority to receive money for the indorser, there the restriction operates; and if such indorsee again indorses it over, the second indorsee cannot hold it, because the first indorsement gave him notice that the first indorsee had no power to transfer the note. (v) And if a note is once indorsed in blank it is thereafter transferable by mere delivery so long as the indorsement continues blank, and its negotiability cannot be restricted by subsequent special indorsements, but the holder may strike them all out and recover under the blank indorsement. (vv) Where one has acquired a bill by indorsement, *bonâ fide*, he may hold it and recover upon it, although earlier parties knew that it was transferred wrongfully or without authority. (w)

to enable him to pass it away, and not to treat him as owner of the bill himself, no property passed from Edwards to him; and if such property had been alleged, the case of *Lloyd v. Howard* would apply. But that decision does not hold with respect to a third person who received it from the agent whom Edwards intrusted with it, and who has paid value for it." See also *Marston v. Allen*, 8 M. & W. 494; *Andrews v. Bond*, 16 Barb. 633; *Smith v. Braine*, 3 E. L. & E. 379; *Moody v. Threlkeld*, 13 Georgia, 555; *Stoddard v. Kimball*, 6 Cush. 469.

(u) *Ancher v. Bank of England*, Doug. 637; *Sigourney v. Lloyd*, 8 B.

& C. 622; S. C. 3 M. & P. 229; 5 Bing. 525; *Robertson v. Kensington*, 4 Taunt. 30. See also *Bolton v. Puller*, 1 Bos. & Pull. 539; *Ramsbotham v. Cator*, 1 Starkie, 228; *Savage v. Aldren*, 2 Stark. 232.

(v) *Edie v. East India Co.* 2 Burr. 1216, per *Wilmot, J.*, *Wilson v. Holmes*, 5 Mass. 543; *Power v. Finnie*, 4 Call, 411, per *Roane, J.*

(vv) *Smith v. Clarke*, 1 Esp. 180; *Peake's Cases*, 225, per Lord Kenyon; *Mitchell v. Fuller*, 15 Penn. 268.

(w) And this although his indorser acquired the bill or note by fraud. *Saltmarsh v. Tuthill*, 13 Ala. 390. See also *Haly v. Lane*, 2 Atk. 181, where Lord

If a negotiable bill or note which is open to any defence that can be made only against a holder with knowledge or notice, pass by indorsement, for consideration, to a holder without knowledge or notice, against whom the defence cannot be made, and this holder indorse it over for consideration to a party who has knowledge or notice of the defence, such indorsee may nevertheless recover on the note, because he stands on the right of his indorser. The party bound to pay it to the holder without notice is not injured by being bound to pay it to his indorsee; and the innocent holder has not only the right of enforcing payment, but of transferring the note by indorsement; and with it all his rights. (*ww*)

*SECTION IV.

OF INDORSEMENT AFTER MATURITY.

Bills and notes are usually transferred by indorsement before they are due. But they may be so transferred after they are due, and before they are paid. There is, however, a very important difference between the effect of the transfer of a bill or note before its maturity, and that of such transfer when the bill or note is overdue. The *bonâ fide* holder of a bill by indorsement before maturity takes it subject to no equities existing between his assignor and the promisor which are not indicated on the face of the note. (*x*) It was once much questioned whether he who received a note under circumstances of suspicion was not bound to ascertain for himself, and at his own peril, that the note came rightfully into his hands;

Hardwicke is reported to have said:—
“Where there is a negotiable note, and it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him, unless there should be some fraud or equity against him appearing in the case.”

(*ww*) *Haskell v. Whittemore*, 19 Maine, 102; *Thomas v. Newton*, 2 C. & P. 606;

Solomons v. Bank of England, 13 East, 135; *Smith v. Hiscock*, 14 Maine, 449; *Chalmers v. Lanior*, 1 Camp. 383.

(*x*) *Brown v. Davies*, 3 Term, 82, *Buller, J.*; *Hall v. Wilson*, 16 Barb. 548; *Fletcher v. Gushee*, 32 Maine, 587; *Walker v. Davis*, 33 Maine, 516; *Gwynn v. Lee*, 9 Gill, 138; *Kohlman v. Ludwig*, 5 Louis. Ann. 33. And the doctrine of *lis pendens* is held not to apply to negotiable notes. *Winston v. Westfeldt*, 22 Ala. 760.

and therefore a promisor might defend against the note, by showing that he had lost it, or that it was stolen from him, or by any other similar defence, showing also that this might have been ascertained by the holder before receiving the note. (y) But the weight of recent authority is decidedly in favor of the rule that such holder is entitled to the benefit of the note, unless he is a wilful party to the wrong by which it comes into his hands, or, perhaps, has been guilty of such negligence as amounts to constructive fraud. (z) For even gross negligence alone *would not deprive him of his right. (a) The law is otherwise, however, if the bill or note were transferred to him when overdue. It comes to him then discredited; he is put upon his guard; and, although he pays a full consideration for it, he receives nothing but the title and rights of his assignor. Such a bill or note can no longer represent a distinct and definite credit, or money to be paid at a certain period; and as it no longer answers the purpose or performs the functions of negotiable paper, it no longer shares the privileges of such instruments. And it is therefore said that any defence which might be made against the assignor may be made available against the assignee. (b) This

(y) In *Gill v. Cubitt*, 3 B. & C. 466, where a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning, by a person whose features were known, but whose name was unknown to the broker, and the latter, being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it; it was held that, in an action on the bill by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man; and they having found for the defendant, the court refused to disturb the verdict. *Down v. Halling*, 4 B. & C. 330.

(z) *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56; *Goodman v. Harvey*, 6 N. & M. 372; *Cone v. Baldwin*, 12 Pick. 545; *Wheeler v. Guild*,

20 Pick. 545; *Smith v. Mechanics and Traders Bank*, 6 Louis. Ann. 610.

(a) "Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine." Per Lord Denman, *Goodman v. Harvey*, 4 Ad. & El. 870, 6 N. & M. 372. It is a question for the jury whether the party taking the bill was guilty of bad faith. See *Cunliffe v. Booth*, 3 Bing. N. C. 821. In *Crook v. Jadis*, 5 Bar. & Ad. 909, *Patteson, J.*, says:—"I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." But the authority of these cases is denied in *Pringle v. Phillips*, 5 Sandf. 157, and an opposite doctrine strongly maintained and decided.

(b) *Brown v. Davies*, 3 Term, 80; *Beck v. Robley*, 1 H. Bl. 89, n. (a); *Howard v. Ames*, 3 Metc. 308; *Mackay v. Holland*, 4 Met. 69; *Potter v. Tyler*, 2 Met. 58; *McNeill v. McDonald*, 1 Hill's So. Car. 1; *Mosteller v. Bosh*, 7

rule needs, however, some qualifications. It is said by high authorities, and on good reason, that the defence must arise from the note itself, or the transaction in which the note originated, and not from any collateral matter. (c)

*As between *the original parties* to negotiable paper the consideration may be inquired into; and so it may as between indorser and indorsee. (d) But an action by an indorsee against the maker cannot be defeated by showing that no consideration passed to the maker from the payee and indorser. (e) It is sometimes said that such defence is good against the indorsee when the indorsee took the paper with notice of the want of consideration, or of any circumstances which would have avoided the note in the hands of the indorser. (f) But the case of an accommodation note, whether made or indorsed for the benefit of the party to whom the

Ire. Eq. 39; *Connery v. Kendall*, 5 Louis. Ann. 515; *Sawyer v. Hoovey*, Ib. 153; *Lancaster Bank v. Woodward*, 18 Penn. 357; *Clay v. Cottrell*, Ib. 408.—The burden of proving, however, that the note was indorsed after it was overdue, in order to let in his equities, is on the defendant; for the presumption is that the indorsement was made at or soon after the date of the note, or at least before its maturity. *Burnham v. Wood*, 8 N. Hamp. 334; *Burham v. Webster*, 19 Maine, 232; *Ranger v. Cary*, 1 Met. 369; *Cain v. Spann*, 1 McMullan, 258; *Washburn v. Ramsdell*, 17 Verm. 299.—And this burden is not discharged by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards. *Ranger v. Cary*, 1 Met. 369.—Suspicious circumstances, however, may rebut this presumption. *Snyder v. Riley*, 6 Barr, 165; *Tams v. Way*, 13 Penn. 222.

(c) *Burrough v. Moss*, 10 B. & C. 558; *Whitehead v. Walker*, 10 M. & W. 696; *Carruthers v. West*, 11 Q. B. 143; *Hughes v. Large*, 2 Barr, 103; *Cumberland Bank v. Hann*, 3 Harrison, 223; *Chandler v. Drew*, 6 New Hamp. 469; *Robinson v. Lyman*, 10 Conn. 31; *Britton v. Bishop*, 11 Verm. 70; *Robertson v. Breedlove*, 7 Porter, 541; *Tuscumbia R. R. Co. v. Rhodes*, 8 Ala. 206; *Tinsley v. Beall*, 2 Georgia, 134; *Harkins v. Shoup*, 2 Cart. (Ind.) 342. In

Massachusetts and South Carolina, *all* set-offs between the original parties existing at the time of the transfer of the title are allowed. *Sargent v. Southgate*, 5 Pick. 312; *Nixon v. English*, 3 McCord, 549; *Perry v. Mays*, 2 Bailey, 354; *Cain v. Spann*, 1 McMullan, 258. So in Maine. *Burnham v. Tucker*, 18 Maine, 179; *Wood v. Warren*, 19 Maine, 23.—In New York the point was considered doubtful in *Miner v. Hoyt*, 4 Hill, 193, 197.—In Massachusetts, however, equities arising between the original parties after the transfer of title, but before notice to the maker, cannot be set off as against the indorsee. *Ranger v. Cary*, 1 Met. 369; *Baxter v. Little*, 6 Met. 7.

(d) *De Bras v. Forbes*, 1 Esp. 117; *Lickbarrow v. Mason*, 2 Term Rep. 71, per *Ashhurst, J.*; *Abbott v. Hendricks*, 1 M. & Gr. 791; *Herrick v. Carman*, 10 Johns. 224; *Hill v. Ely*, 5 Serg. & Rawle, 363; *Clement v. Reppard*, 15 Penn. S. R. 111; *Johnson v. Martinus*, 4 Hals. 144; *Hill v. Buckminster*, 5 Pick. 391; *Bramhall v. Beckett*, 31 Maine, 205; *Fisher v. Salmon*, 1 California, 413.

(e) *Perkins v. Challis*, 1 New Hamp. 254; *Waterman v. Barratt*, 4 Harring. 311.

(f) *Steers v. Lashley*, 6 Term R. 61; *Wyat v. Bulmer*, 2 Esp. 538; *Perkins v. Challis*, 1 New Hamp. 254; *Brown v. Davies*, 3 Term, 80; *Down v. Halling*, 4 B. & C. 330; *Ayer v. Hutchins*, 4

maker or indorser intends to lend his credit, is an exception to this rule. If A. makes a note to B. or his order, intending to lend B. his credit, and gives it to B. to raise money on, B. cannot sue A. on that note; but if he indorses it to C., who discounts the note in good faith, knowing it however to be an accommodation note and without valuable consideration, C. can nevertheless recover the note from A. The maker may, therefore, have a defence against the payee which he cannot have against an indorsee who has knowledge of that defence. (g) But this is true only where the consideration paid by the indorsee may be regarded as going to the maker, in the same manner that it would if the payee had been promisor, and the maker had signed the note as his surety. The indorsers of accommodation paper are not, however, so far sureties as to have a claim of contribution against each other. (h) In general, accommodation notes or bills are now governed by the same rules as negotiable paper for consideration. (i)

*On the ground that negotiable paper is intended only for business purposes, and has its peculiar privileges only that it may more perfectly perform this function, it has been held that one who takes a negotiable note, even before its maturity, but only in payment of or as security for an antecedent debt, without giving for it any new consideration, does not take it in the way of business, and is not a *bonâ fide* holder; and that he therefore holds the note subject to all equitable defences. This doctrine rests upon adjudications and opinions of great weight; but it is also denied by very high authorities; indeed by the highest in this country, the Supreme Court of the United States, who have decided that a præ-

Mass. 370; Thompson v. Hale, 6 Pick. 259; Littell v. Marshall, 1 Robinson's Louisiana Rep. 57.

(g) Thompson v. Shepherd, 12 Met. 311; Smith v. Knox, 3 Esp. 46; Brown v. Mott, 7 Johns. 361; Grant v. Ellicott, 7 Wend. 227. Molson v. Hawley, 1 Blatch. 409. And this is so, even if the indorsee took the bill after it became due. Charles v. Marsden, 1 Taunt. 224; Carruthers v. West, 11 Q. B. 143; Renwick v. Williams, 2 Maryl. 356.

(h) Aiken v. Barkley, 2 Speers, 747.

(i) Fentum v. Pocock, 5 Taunt. 192; Bank of Montgomery v. Walker, 9 S. & R. 229; Murray v. Judah, 6 Cowen, 484; Clopper v. Union Bank of Maryland, 7 Har. & Johns. 92; Church v. Barlow, 9 Pick. 547; Grant v. Ellicott, 7 Wend. 227; Marr v. Johnson, 9 Yerg. 1; Per Wilde, J., Com. Bank v. Cunningham, 24 Pick. 274. See also Parks v. Ingram, 2 Foster, 283.

isting debt, of itself, and without any streng'hening circumstances, is of itself a sufficient consideration. But it has nevertheless been held since that decision, by courts entitled to great respect, that the doctrine of the Supreme Court is erroneous and untenable. It must be admitted that the law on this subject is in a very unsettled state; but it may be supposed that in this country the authority of the Supreme Court will generally prevail. (j)

*SECTION V.

NOTES ON DEMAND.

Bills and notes payable on demand are in one sense always overdue; they are not, however, so treated until payment has been demanded and refused; then they become like bills on time which have been dishonored; and to bring them within this rule there should be evidence of such demand and refu-

(j) This question has not yet received a distinct adjudication in England, and the following cases, in which it has incidentally arisen, leave in doubt what the inclination of judicial opinion is. *Bramah v Roberts*, 1 Bing. N. C. 469; *Percival v. Frampton*, 2 C. M. & R. 180; *Crofts v. Beale*, 5 E. L. & E. 408. The decisions in this country have turned chiefly upon the question whether the transfer be for a *valid consideration*. The weight of authority is, that the transfer of a negotiable instrument *in payment* of a debt already due, or where upon the faith of such transfer other security is relinquished, or indulgence given, is for a valid consideration, and entitles the holder to protection. *Smith v. Van Loan*, 16 Wend. 659; *Bank of Salina v. Babcock*, 21 Wend. 499; *Bank of Sandusky v. Scoville*, 24 Wend. 115; *Stalker v. McDonald*, 6 Hill, 93; *Marsshall, C. J., Coolidge v. Payson*, 2 Wheat. 66, 73; *Swift v. Tyson*, 16 Peters, 15; *Williams v. Little*, 11 N. H. 66; *Homes v. Smyth*, 16 Maine, 177; *Norton v. Waite*, 20 Maine, 175; *Adams v. Smith*, 35 Maine, 324; *Brush v. Scribner*, 11 Conn. 388; *Bostwick v. Dodge*, 1 Doug. (Mich.) 413; *Reddick v. Jones*, 6 Ired.

107; *Kimbrow v. Lytle*, 10 Yerger, 417; *Woomley v. Lowry*, 1 Humph. 470; *Kirkpatrick v. Muirhead*, 16 Penn. 123; *Greeneaux v. Wheeler*, 6 Tex. 515. *Contra*, *Rosa v. Brotherson*, 10 Wend. 85. But see *Smith v. Van Loan*, *supra*; *Ontario Bank v. Worthington*, 12 Wend. 593. In the following cases it is held that, where the transfer is *merely* for the sake of *collateral security*, there is no valid consideration, and the holder is not entitled to protection against the equities. *Bay v. Coddington*, 5 Johns. Ch. 54; *S. C.* 20 Johns. 637; *Payne v. Cutler*, 13 Wend. 605; *Stalker v. McDonald*, 6 Hill, 93; *Clark v. Ely*, 2 Sand. Ch. 166; *Mickles v. Colvin*, 4 Barb. Sup. Ct. 304; *Fenby v. Pritchard*, 2 Sand. Sup. Ct. 151; *Kirkpatrick v. Muirhead*, 16 Penn. 123; *Bertrand v. Barkman*, 8 Eng. (Ark.) 150; *Jenness v. Bean*, 10 N. H. 266; *Prentice v. Zane*, 2 Gratt. 262; *Bramhall v. Becket*, 31 Maine, 205; *Contra*, *Swift v. Tyson*, 16 Peters, 15; *Chicopee Bank v. Chapin*, 8 Met. 40; *Stevens v. Blanchard*, 3 Cush. 168; *Valette v. Mason*, 1 Smith, (Ind.) 89; *S. C.* 1 Carter, 288; *Pugh v. Durfee*, 1 Blatch. 412.

sal. But there is this difference between a note on time and a note on demand; a note on time, after that time has passed, is certainly dishonored, and an indorsee must know it. But there is no time when a note on demand *must* have been dishonored, and none therefore when an indorsee *could not* have received it without that knowledge. Nevertheless it seems reasonable to say that if a note which was payable at any day, has not been paid for very many days, it may fairly be presumed to have been dishonored, and an indorsee after this lapse of time, may be held to have had a sufficient notice of its dishonor; and many American authorities hold this view. (k) But it is still true, that the law does not presume that they were made with the intention of immediate demand and payment. And where a note on demand is indorsed within a reasonable time after its date, the indorsee has all the rights of an indorsee of a negotiable note on time where the indorsement was made before maturity; but what this reasonable time shall be must depend upon the facts of the case. It is not determined by any positive rule. (l) Checks

(k) If not negotiated until a *long time* after they are made, they are subject to all the equities in the hands of an indorsee, as they would be in the possession of the payee. *Furman v. Haskin*, 2 Caines, 369; *Hendricks v. Judah*, 1 Johns. 319; and two months and a half after a note was dated was held sufficient to let in the equities of the maker against the payee, in an action by the indorsee. *Losee v. Dunkin*, 7 Johns. 70. Under different circumstances, a period of five months after a note was dated was held not sufficient for this purpose. *Sandford v. Mickles*, 4 Johns. 224. So seven days has been held not to be sufficient. *Thurston v. McKown*, 6 Mass. 428. *Ayer v. Hutchins*, 4 Mass. 370. In this case the rule concerning notes payable on demand was thus laid down by *Parsons, C. J.*:—"A note payable on demand is due presently. In this case the note had been due eight months before it was indorsed, a length of time sufficient to induce suspicions that the promisors would not pay it, and to cause some inquiry to be made, whether it had in fact been dishonored, or why payment had not been made. If there was no other circumstance, this

would be a good reason to let the defendants into any defence which could legally be made by them, if Page [the payee and indorser,] were the plaintiff." In England the principle that a note payable on demand may become discredited by mere lapse of time is not adopted. *Brooks v. Mitchell*, 9 M. & W. 15; *Barrough v. White*, 4 B. & C. 325; *Gascoyne v. Smith*, 1 McC. & Y. 348.

(l) The question of reasonable time, within which a note due on demand must be indorsed after it is made, in order to shut out any equities between the maker and indorser, is purely a question of law. Per *Shaw, C. J.*, *Sylvester v. Crapo*, 15 Pick. 93; *Camp v. Scott*, 14 Verm. 387. — Two days, and even five months, have been held to be within the limit. *Dennett v. Wyman*, 13 Verm. 485; *Sandford v. Mickles*, 4 Johns. 224. So one month. *Ranger v. Carey*, 1 Met. 369. On the other hand, under different circumstances, eight months, and two months, have been considered beyond it. *American Bank v. Jenness*, 2 Met. 288; *Nevins v. Townshend*, 6 Conn. 5; *Camp v. Scott*, 14 Verm. 387. See farther, *Wethey v.*

on bankers, for instance, should * be presented at once; and the rule as to overdue notes is applied with more strictness to them. (*m*)

A bill once paid by the acceptor can no longer be negotiated; but until paid by him it is capable of indefinite negotiation. (*n*) If paid in part it may be indorsed as to the residue. But it cannot be indorsed in part; (*o*) and if it be indorsed in part, and is afterwards indorsed by the same indorser to the same indorsee for the remaining part, this is not a good indorsement. (*p*)

The holder of a bill or note payable to bearer, or of one payable to some payee or order and indorsed in blank, may transfer the same by mere delivery, (*q*) and is not liable upon it. (*qq*) But where one obtains money on a bill or note, by discount, and the bill or note is forged, if he did not indorse it he is still liable to refund the money to the party from whom he received it, on the ground of an implied warranty that the instrument is genuine; and also on the general prin-

Andrews, 3 Hill, 582; *Thompson v. Hale*, 6 Pick. 259; *Mudd v. Harper*, 1 *Maryl.* 110.

(*m*) *Boehm v. Sterling*, 7 Term, 423; *Down v. Halling*, 4 B. & C. 330; *Rothschild v. Corney*, 9 B. & C. 388. But in this country the principle is not considered applicable to bank-notes or bank post notes. *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 562, 577.

(*n*) *Connery v. Kendall*, 5 *Louis. Ann.* 515; *Pray v. Maine*, 7 *Cush.* 253. Per Lord *Ellenborough*, *Callow v. Lawrence*, 3 *M. & S.* 97; *Beck v. Robley*, 1 *H. Bl.* 89, (*n*) — But if a bill is paid by the drawer it may afterwards be reissued by the drawer, and the acceptor will be still liable to pay it. *Hubbard v. Jackson*, 3 *C. & P.* 134, 4 *Bing.* 390, 1 *M. & P.* 11. — In *Callow v. Lawrence*, *supra*, Lord *Ellenborough* said: — “A bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty

to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers.”

(*o*) *Hawkins v. Cardy*, 1 *Ld. Raym.* 360. And although an indorser has paid part of a bill to the indorsee, the latter may still recover the whole amount of the bill against the drawer. *Johnson v. Kennion*, 2 *Wils.* 262.

(*p*) *Hughes v. Kiddell*, 2 *Bay.* 324. This was an action against the indorser of a note. By one indorsement he had assigned part of the sum mentioned in the note, and the residue by another indorsement. The court held that the action could not be supported, on the ground that an indorsement for part of a note or bill is bad; and if so then two vicious indorsements could never constitute a good one. See also *Hawkins v. Cardy*, 1 *Ld. Raym.* 360. *Carth.* 466; *Johnson v. Kennion*, 2 *Wils.* 262, per *Gould, J.*

(*q*) *Davis v. Lane*, 8 *New Hamp.* 224; *Wilbour v. Turner*, 5 *Pick.* 526; *Dole v. Weeks*, 4 *Mass.* 451.

(*qq*) *Camidge v. Allenby*, 6 *B. & Cr.* 373. See also *Rogers v. Langford*, 1 *Cr. & M.* 637.

ciple, that one who pays money without consideration may recover it back. (*r*)

* If a note be made payable on its face or by indorsement to a party or his order, that party can transfer the note in full property only by his indorsement; and when he indorses it he makes himself liable to pay it if those who ought to have paid it to him, had he continued to hold it, fail to pay it to the party to whom he orders it paid. His indorsement is, in itself, only an order on them to pay the bill or note; but the law annexes to this order a promise on his part to pay the bill or note if they do not. He may guard against this by indorsing it with the words "without recourse," which mean, by usage, that the holder is not to have, in any event, recourse to the indorser. (*s*) And the same purpose will be answered if he uses any other words distinctly expressive of the same meaning. But without such words he is liable for the whole amount. (*t*)

It is this peculiarity which gives their great value and utility to bills and notes as instruments of commerce and business. And this liability is strictly defined and very carefully watched and protected. It is a conditional liability only. All the previous parties must have the bill or note presented to them, and payment demanded; and notice of the demand and non-payment must be given to all. And this requirement is very precise as to time, and somewhat so as to form; as we shall presently see.

It has been said that every party so indorsing a bill or note

(*r*) *Jones v. Ryde*, 1 Marsh. 157, 5 Taunt. 489; *Bruce v. Bruce*, 1 Marsh. 165, 5 Taunt. 495; *Eagle Bank v. Smith*, 5 Conn. 71; *Canal Bank v. Bank of Albany*, 1 Hill, 87. *Sed, aliter*, if the bill or note is discounted by the banker of the acceptor or maker. *Smith v. Mercer*, 6 Taunt. 76. The ruling of *Abbott, C. J.*, in *Fuller v. Smith, Ry. & Mood*, 49, is not consistent with *Smith v. Mercer*.

(*s*) *Rice v. Stearns*, 3 Mass. 225; *Up-ham v. Prince*, 12 Mass. 14; *Waite v. Foster*, 33 Maine, 424—And an indorsement of a note without recourse passes it with all its negotiable qualities, as much as if indorsed in blank. *Epler v.*

Funk, 8 Barr, 468. Such an indorsement transfers the indorser's whole interest therein, but taken with other circumstances, it tends to show that the note was not indorsed for value, and therefore to open to the maker the same defences against the indorsee which he could have made against the payee. *Richardson v. Lincoln*, 5 Mct. 201.

(*t*) *Goupy v. Harden*, 7 Taunt. 159. In this case it was held, that an agent purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal on his indorsement, however small his commission.

may be regarded as making a new bill or note; (*u*) this, though true in general, may not be precisely and exactly the rule of law; still important consequences sometimes flow * from it. Thus an acceptor is bound, although the name of the drawer is forged, and an indorser, although the maker's name is forged; for by acceptance, and by each indorsement, a new contract is formed. (*v*) And the same rule would apply to a party who intervenes and accepts or pays *supra protest*. (*vv*) But a distinction has been taken between a bill with the signature forged, and one of which the whole body is forged, holding that the implied admission or warranty of the acceptor does not apply in this latter case. (*w*) So, if a bank pays a forged check, it bears the loss. (*x*) And if a bank receive payment of an amount due to it in its own bills, which turn out to be forged, it is bound. (*y*) But, in general, payment of a debt in forged bills, both parties being innocent, is no payment, nor is a bank bound by discounting a forged note. (*z*) But the loser by forged paper can recover it back only by showing proper diligence to detect the forgery, and to give notice to those who might be affected by it. (*a*)

Whether payment of a debt in bills of an insolvent bank, both parties being ignorant of the fact, is payment, seems not to be quite settled. It must depend upon the question (which in each case may be affected by its peculiar circumstances,)

(*u*) Chitty & Hulme on Bills, p. 241, and cases cited. See also Pease v. Turner, 3 How. (Miss.) 375. — In Gwinnett v. Herbert, 5 Ad. & El. 436, it is said that the indorser of a promissory note does not stand in the situation of maker relatively to his indorsee, and the latter cannot declare against him as maker.

(*v*) Wilkinson v. Lutwidge, 1 Str. 648; Jenys v. Fawler, 2 Str. 946; Price v. Neale, 3 Burr. 1354; Smith v. Chester, 1 T. R. 655, per Buller, J.; Bass v. Clive, 4 M. & S. 15, per Dampier, J.; Smith v. Mercer, 6 Taunt. 76; Robinson v. Reynolds, 2 Q. B. 196; Canal Bank v. Bank of Albany, 1 Hill, 287; Goddard v. Merchants Bank, 4 Coms. 147; Hamilton v. Pearson, 1 Cart. (Ind.) 540. So also the acceptor undertakes that the drawer has the capacity to draw

and indorse. Drayton v. Dale, 2 B. & C. 299; 3 D. & R. 534, per Bayley, J.; Smith v. Marsack, 6 C. B. 486.

(*vv*) Goddard v. Merchants Bank, 4 Comst. 147.

(*w*) Bank of Commerce v. Union Bank, 3 Comst. 230. But see Hall v. Fuller, 5 B. & C. 750.

(*x*) Levy v. Bank of United States, 1 Binn. 27; Bank of St. Albans v. F. & M. Bank, 10 Verm. 141.

(*y*) United States Bank v. Bank of Georgia, 10 Wheat. 333.

(*z*) Stedman v. Gooch, 1 Esp. 5; Markle v. Hatfield, 2 Johns. 455; Young v. Adams, 6 Mass. 182; Eagle Bank v. Smith, 5 Conn. 71.

(*a*) Gloucester Bank v. Salem Bank, 17 Mass. 33; Canal Bank v. Bank of Albany, *supra*; Pope v. Nance, 1 Minor, (Ala. Rep.) 299.

whether the payee takes the bills as absolute payment at his own risk, or takes them only as conditional payment, he to be bound only to use due diligence in collecting the bills, and if he fails, the payment be null. Perhaps the weight of authority, as well as of reason, is in favor of this last view predominating where there is no sufficient evidence of a contrary intention. (*b*)

*The liability of an indorser may be considered, first as it depends on the demand of payment, and then as to notice of non-payment, and the proceedings necessary thereon. But bills of exchange must also, in some instances, be presented for acceptance, when they are made payable at a certain time after sight, in order to fix the day of their maturity. If payable in so many days after date this is not necessary. But the holder may present any bill for acceptance, at any time, even the last day before it is due; and if not accepted may sue the drawer and indorser. It is prudent and usual to present a bill for acceptance soon after it is received, as the holder thereby acquires the security of the acceptor. (*c*)

SECTION VI.

OF PRESENTMENT FOR ACCEPTANCE.

Presentment for acceptance should be made by the holder or his authorized agent to the drawee or his authorized agent, (*d*) during the usual hours of business. (*e*) And the

(*b*) *Ellis v. Wild*, 6 Mass. 321; *Ontario Bank v. Lightbody*, 11 Wend. 9, 13 Wend. 101; *Wainwright v. Webster*, 11 Verm. 576; *Gilman v. Peck*, Id. 516; *Fogg v. Sawyer*, 9 New Hamp. 365; *Frontier Bank v. Morse*, 22 Maine, 88; *Timmis v. Gibbins*, 14 E. L. & E. 64, and note; *Contrà*, *Lowrey v. Murrell*, 2 Porter, (Ala.) 280; *Scruggs v. Gass*, 8 Yerg. 175; *Bayard v. Shunk*, 1 W. & S. 92.

(*c*) *Muilman v. D'Equino*, 2 H. Bl. 565. It was here held that there is no fixed time within which a bill payable at sight, or a certain time after, shall be presented to the drawee. It must be a

reasonable time; and that is a question for the jury to decide from the circumstances of each case. See also *Fry v. Hill*, 7 Taunt. 397.—No cause of action arises upon a bill payable at sight, until it is presented. *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, Ry. & Mo. 388.

(*d*) *Cheek v. Roper*, 5 Esp. 175. It is not sufficient to call at the residence of the drawee and present the bill to some person, who is unknown to the party calling. *Ib*.

(*e*) *Elford v. Teed*, 1 M. & S. 28; *Church v. Clark*, 21 Pick. 310; *Bank of United States v. Carneal*, 2 Peters, 543;

drawee has until the next day to determine whether he will accept, but may answer at once. (*ee*) And a bill may be in some sort accepted before it is drawn, for a written promise to accept a certain bill hereafter to be made is construed as an acceptance, if precisely that bill is drawn within a reasonable time after such promise. (*f*) The acceptance must also be absolute, and not in any respect differing from the terms of the bill. If any other be given, the holder may assent and so bind the acceptor, but must give notice as of non-acceptance to other parties, in order to hold them. (*ff*) The usual way of accepting is by writing the word "accepted" on the face of the bill, and signing the acceptor's name; but there is no precise formula or method which is necessary to constitute a good acceptance. It seems to be enough if it is substantively a distinct promise to pay the bill according to its terms, whether it be in writing upon the bill or upon a separate paper, or by parol. (*g*)

Harrison v. Crowder, 6 Smedes & Mar. 464; *Parker v. Gordon*, 7 East, 385.—And presentment after banking hours, and an authorized person then answering, has been held sufficient. *Garnett v. Woodcock*, 1 Stark. 475. A presentment, however, at eight o'clock in the evening, at the drawee's residence, has been held at a reasonable hour. *Barclay v. Bailey*, 2 Camp. 527.—But eleven or twelve at night has been held otherwise. *Dana v. Sawyer*, 22 Maine, 244. So of a demand at eight in the morning. *Lunt v. Adams*, 17 Maine, 230. See *Flint v. Rogers*, 15 Maine, 67; *Commercial Bank v. Hamer*, 7 How. (Miss.) 448; *Cohea v. Hunt*, 2 Smedes & Mar. 227.—The rule is in all cases that the presentment should be at a reasonable time; and when the paper is due from or at a bank, it should, as we have already said, as a general rule, be presented within banking hours. But in other cases the period ranges through the whole day, down to the time of going to bed. *Cayuga Bank v. Hunt*, 2 Hill, 635.

(*ee*) *Montgomery County Bank v. Albany City Bank*, 8 Barb. 399.

(*f*) *Pillans v. Van Mierop*, 3 Burr. 1670; *Coolidge v. Payson*, 2 Wheaton, 66; *Wilson v. Clements*, 3 Mass. 1; *Goodrich v. Gordon*, 15 Johns. 6; *Parker v. Greele*, 2 Wend. 545; *Kendrick*

v. Campbell, 1 Bailey, 522; *Carnegie v. Morrison*, 2 Met. 381; *Storer v. Logan*, 9 Mass. 55; *McEvers v. Mason*, 10 Johns. 207; *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 121; *Williams v. Winans*, 2 Green, 339; *Bayard v. Lathy*, 2 McLean, 462; *Vance v. Ward*, 2 Dana, 95; *Reed v. Marsh*, 5 B. Monroe, 8; *Howland v. Carson*, 15 Penn. 453; *Beach v. State Bank*, 2 Cart. (Ind.) 488; *Cassel v. Dows*, 2 Blatch. 335.—But this rule is applicable only to bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight; for it is obvious that to constitute an acceptance in the latter cases a presentment is indispensable, since the time that the bill is to run cannot otherwise be ascertained. Story on Bills of Exch. § 249; *Wildes v. Savage*, 1 Story, 22; *Russell v. Wiggin*, 2 Story, 213.

(*ff*) *Walker v. Bank of State of New York*, 13 Barb. 636; *Lyon v. Sundius*, 1 Camp. 423; *Russell v. Phillips*, 14 Q. B. 891.

(*g*) *Edson v. Fuller*, 2 Foster, 183; *Wynne v. Raikes*, 5 East, 514; *Fairlee v. Herring*, 3 Bing. 625. In this case, bills having been drawn on the defendants by their agent, and with their authority, in respect of a mine which they afterwards transferred to A., they requested A. to place funds in their

SECTION VII.

OF PRESENTMENT FOR PAYMENT.

A bill or note must be presented for payment at its maturity, or the indorsers are not held. They guarantee its payment, not by express words, but by operation of law. And for their protection the law annexes to their liability, as a condition, that reasonable efforts shall be made to procure the payment from those bound to pay before them, and also that they shall have reasonable notice of a refusal to pay, that they may have an opportunity to indemnify themselves. The justice of this is obvious. A holder of a note, with a good indorser, might be very indifferent as to the payment by the promisor or an earlier indorser, if he knew that he could certainly collect the amount from the indorser on whom he relied; therefore the very liability of this indorser is made to rest upon the efforts of the holder to obtain the money from the prior parties. Again; each indorser transfers by indorsement a debt due to himself, and if by the guaranty which springs from his indorsement he has to pay this debt to another, he is entitled to all the knowledge which will enable him to secure a payment of this debt to himself. The rules, and the exceptions to the rules, in relation to demand of payment and notice of non-payment, will be found to rest upon these principles.

Generally, the question of reasonable time, reasonable dili-

hands to meet the bills when due, saying, "it would be unpleasant to have bills drawn on them paid by another party." A. placed funds accordingly, but when the bills were left with defendants for acceptance, no acceptance was written on them. A's agent having complained to one of the defendants on the subject, he said, "What, not accepted? We have had the money, and they ought to be paid, but I do not interfere in this business, you should see my partner." And it was holden that all this amounted to a parol acceptance of the bills, on which the defendants

were liable to an indorsee, between whom and A. there was no privity, and that the indorsee was not precluded from suing, by having made a protest in ignorance of this acceptance.—In *Ward v. Allen*, 2 Met. 53, a bill was read to the drawee, who said it was correct and should be paid; and this was treated as a sufficient acceptance. See *Parkhurst v. Dickerson*, 21 Pick. 307; *Luff v. Pope*, 5 Hill, 413; *Walker v. Lide*, 1 Rich. 249; *Walker v. Bank of State of New York*, 13 Barb. 638; *Lewis v. Kramer*, 3 Maryl. 265; *Orear v. McDonald*, 9 Gill, 350.

gence, and reasonable notice, is open to the circumstances of every case, and is determined by a reference to them. But in regard to bills and notes the law merchant has defined all of these with great exactness.

The general rule may be said to be, that the drawer and indorsers of a bill and the indorsers of a note are discharged from their liability, unless payment of the bill or note be demanded from the party bound to pay it, on the day on which it falls due. (*h*) And if the holder neglects to make such demand, he not only loses the guaranty of subsequent parties, but all right to recover for the consideration or debt for which the bill or note was given. (*i*)

Let us look at the exceptions to this rule requiring such presentment of a bill or note. Bankruptcy or insolvency, however certain or however manifested, is not one. (*j*) Though the bank or shop be shut, presentment there or to the parties personally must still be made. (*k*) Nor will the

(*h*) *Field v. Nickerson*, 13 Mass. 131; *Martin v. Winslow*, 2 Mason, 241; *Sice v. Cunningham*, 1 Cowen, 397; *Montgomery County Bank v. Albany City Bank*, 8 Barb. 396; *Holbrook v. Allen*, 4 Florida, 87; *Robinson v. Blen*, 20 Maine, 109; *Magruder v. Union Bank*, 3 Peters, 87; *Juniata Bank v. Hale*, 16 Serg. & Rawle, 157. If the bill or note is payable at a time certain, it must be presented on the last day of grace; and a demand either before or after that day is insufficient to charge the indorser. *Ibid*; *Howe v. Bradley*, 19 Maine, 31; *Leavitt v. Simes*, 3 New Hamp. 14; *Farmers Bank v. Duvall*, 7 G. & J. 78; *Piatt v. Eads*, 1 Blackf. 81; *Etting v. Schuylkill Bank*, 2 Barr, 355.

(*i*) *Bridges v. Berry*, 3 Taunton, 130; *Camidge v. Allenby*, 6 B. & C. 373. This was an action for the price of goods. It appeared that the same were sold at York on Saturday the 10th December, 1825, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, as and for a payment of the price, certain promissory notes of the bank of D. & Co. at Huddersfield, payable on demand to bearer. D. & Co. stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed

their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment; but on Saturday the 17th he required the vendee to take back the notes, and to pay him the amount, which the latter refused. *Held*, under these circumstances, that the vendor of the goods was guilty of laches, and had thereby made the notes his own, and, consequently, that they operated as a satisfaction of the debt.

(*j*) *Russell v. Langstaffe*, Doug. 515; *Ex parte Johnston*, 3 Dea. & Ch. 433; *Bowes v. Howe*, 5 Taunt. 30; *Gower v. Moore*, 25 Maine, 16; *Ireland v. Kip*, Anthon, 142; *Shaw v. Reed*, 12 Pick. 132; *Groton v. Dalheim*, 6 Greenl. 476; *Holland v. Turner*, 10 Conn. 308; *Orear v. McDonald*, 9 Gill, 350. And although the indorsers, at the time of indorsement, had reason to believe, and did believe, that the maker would not pay, this does not dispense with the necessity of due notice to them of such maker's default. *Denny v. Palmer*, 5 Ired. 610; *Oliver v. Munday*, 2 Pennington R. 982; *Allwood v. Haseldon*, 2 Bailey, 457.

(*k*) *Bowes v. Howe*, 5 Taunt. 30, reversing the decision of the King's Bench

death of the party prevent the necessity of demanding payment of his personal representatives, if he have any, (*l*) and if not, at his house. But delay or omission to demand payment does not discharge the drawer of a bill, if the drawee had in his hands no effects of the drawer, at any time between the drawing of the bill and its maturity, and had no right on other ground to expect the payment of the bill, (*m*) for the drawer had then no right to draw the bill, and therefore no right to demand or notice, because he could not profit by it to get payment to himself of the debt from the drawee, there being no such debt. So also if the transaction between the drawer and the drawee was illegal. (*n*) But such presentment should still be made to hold the subsequent parties. (*o*) The discharge from liability arising from such delay or omission may be waived, by an express promise to pay made *after* such discharge, or by a payment in part, from which the law infers an acknowledgment of liability; but not by a promise made *before* such delay or omission. (*p*) If the

in the same case, 16 East, 112. And see *Camidge v. Allenby*, 6 B. & C. 373. If the maker is absent on a voyage at sea, having a domicile within the State, payment must be demanded there. *Whittier v. Groffam*, 3 Greenl. 82; *Dennie v. Walker*, 7 New Hamp. 199. See *Ogden v. Cowley*, 2 Johns. 274; *Galpin v. Hard*, 3 McCord, 394; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294.

(*l*) *Gower v. Moore*, 25 Maine, 16; *Landry v. Stansbury*, 10 Louis. R. 484.

(*m*) *De Berdt v. Atkinson*, 2 H. Bl. 336; *Terry v. Parker*, 6 Ad. & El. 502; *Kinsley v. Robinson*, 21 Pick. 327; *Foard v. Womack*, 2 Ala. 368; *Wollenweber v. Ketterlinus*, 17 Penn. 389; *Allen v. Smith's Admr.* 4 Harring. 234; *Oliver v. Bank of Tenn.* 11 Humph. 74; *Orear v. McDonald*, 9 Gill, 350. See also *Fitch v. Redding*, 4 Sandf. 130. But where a note is signed by one person as a principal, and others as sureties, it is not a sufficient excuse to show that the sureties had no funds in the place of payment; for it was the duty of the maker, and not of the sureties, to provide for the payment. *Fort v. Cortes*, 14 Louis. R. 180.

(*n*) *Copp v. McDugall*, 9 Mass. 1. Where the indorsee of a negotiable pro-

missory note failed of recovering against the promisor, because the original contract was usurious, the indorser, who was the original payee, was held liable, without notice, for the amount due by the note, but not for the costs of the indorsee's action against the promisor.

(*o*) *Wilkes v. Jacks*, Peake's N. P. Cas. 202; *Leach v. Hewitt*, 4 Taunt. 730; *Ramdulollday v. Darieux*, 4 Wash. Cir. Rep. 61.

(*p*) That a payment of part is waiver of a non-demand on the maker, see *Vaughan v. Fuller*, Strange, 1246; *Taylor v. Jones*, 2 Camp. 106; *Lundie v. Robertson*, 7 East, 231; *Haddock v. Bury*, Id. 236, note; *Hodge v. Fillis*, 3 Camp. 464; *Hopley v. Dufresne*, 15 East, 275.—That a new promise to pay, after notice of the neglect to demand of the maker, is a waiver, see *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Secley v. Bisbee*, 2 Verm. 105; *Ladd v. Kenney*, 2 New Hamp. 340; *Rogers v. Hackett*, 1 Foster, 100; *Breed v. Hillhouse*, 7 Conn. 523.—It has been decided that it must be shown affirmatively, however, that the indorser, when he made the promise, knew that no demand had been made on the maker. *Otis v. Hussey*, 3 New Hamp. 346; *New Orleans Railroad Co. v. Mills*, 2 Louis. Ann. 824;

party who should pay the note has absconded, or has no domicil or regular place of business, and cannot be found by reasonable endeavors, payment need not be demanded of him, because it would be of no utility to a subsequent party; (q) *still, notice of these facts should be given. And it has been held that where demand of payment was delayed by political disturbances, or by any invincible obstacle, it was enough if the demand was made as soon as possible after the obstruction ceased. (r)

Where the bill or note is *made payable* at a particular place specified in the body of it, it seems to be the rule in England that it must be presented for that purpose at that place, for the place is part of the contract; (s) but, in this country, neither such bill or note, nor a bill drawn payable generally, but accepted payable at a specified place, need be presented at

Robinson v. Day, 7 Louis. Ann. 201. But it is said in Bruce v. Lytle, 13 Barb. 163, that where there is an express promise demand and notice will be presumed unless the contrary be shown.—So if an indorser take *full* security from the maker to secure him against his liability to pay the note, this excuses a demand on the maker, and notice thereof to the indorser. Durham v. Price, 5 Yerger, 300; Duvall v. Farmers Bank, 9 G. & J. 31; Mead v. Small, 2 Greenl. 207; Marshall v. Mitchell, 35 Maine, 223; Prentiss v. Danielson, 5 Conn. 175; Perry v. Green, 4 Harrison, 61; Mechanics Bank v. Griswold, 7 Wend. 165; Coddington v. Davis, 3 Den. 16; Bond v. Farnham, 5 Mass. 170; Stephenson v. Primrose, 8 Porter, 155.—*Aliter*, of only *part* security. Spencer v. Harvey, 17 Wend. 489; Bruce v. Lytle, 13 Barb. 163; Burroughs v. Hanegan, 1 McLean, 309; Kyle v. Green, 14 Ohio, 495; Woodman v. Eastman, 10 New Hamp. 359.—And the whole doctrine itself is subject to many qualifications; and in Kramer v. Sanford, 4 Watts & Serg. 328, where the American authorities are fully reviewed, Gibson, C. J., observed that this doctrine of waiver in consideration of security had no footing in Westminster Hall.

(q) Putnam v. Sullivan, 4 Mass. *45; Gilbert v. Dennis, 3 Met. 495, 499, per Shaw, C. J.; Duncan v. McCullough, 4 S. & R. 480; Lehman v. Jones, 1 Watts & Serg. 126; Wheeler v. Field, 6 Met.

290; Gist v. Lybrand, 3 Ohio, 307; Central Bank v. Allen, 16 Maine, 41; Bruce v. Lytle, 13 Barb. 163; Nailor v. Bowie, 3 Maryl. 251.—So when the maker of the note was a seafaring man, having no residence or place of business in the State, and was at sea when payment was due, no demand was held requisite. Moore v. Coffield, 1 Devereux, 247.—But where the holder was told, at the time of the indorsement, that the maker was a transient person, and his residence unknown, *an effort* should be made notwithstanding, to find him. Otis v. Hussey, 3 New Hamp. 346.

(r) Patience v. Townley, 2 Smith R. 223. And so the prevalence of a contagious malignant fever in the place of residence of the parties, which occasioned a stoppage of all business, has been held a sufficient excuse for a delay of two months in giving notice of a non-payment. Tunno v. Lague, 2 Johns. Cas. 1. If the holder deposits the note in the post-office in season to reach the place of payment at the proper time, to be there presented by his agent, but through the mistake of the postmaster it is misdirected and delayed, these facts have been held to excuse the delay. Windham Bank v. Norton, 22 Conn. 213.

(s) Rowe v. Young, 2 Brod. & Bing. 165; Sanderson v. Bowes, 14 East, 500; Spindler v. Grellett, 1 Exch. 384; Emblin v. Dartnell, 12 M. & W. 830.

that place, (*t*) in order to sustain an action against the maker or acceptor, but he may show, by way of defence, that he was ready there with funds, and thus escape all damages and interest; (*u*) and if he can show positive loss from the want of such presentment, (as the subsequent failure of a bank where he had placed funds to meet the bill,) he will be discharged from his liability on the bill to the amount of such loss. Such seems to be the prevailing, though not the only view, taken of this subject by the American authorities; for some of much weight hold, that where the acceptance is thus qualified, the holder may refuse it and protest as for non-acceptance; but if he receives and assents to it he is bound by it, and can demand payment nowhere else. The drawers *and indorsers are certainly discharged by a neglect to demand payment at such specified place. (*v*) If the place be designated only in a memorandum, not in the body of the bill or note, presentment may be made at such place, but may also be made where it might have been without such memorandum. (*w*) If the note be payable at *any* of several different

(*t*) *United States Bank v. Smith*, 11 Wheat. 171; *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Caldwell v. Cassidy*, 8 Cow. 271; *Haxtun v. Bishop*, 3 Wend. 15; *Wallace v. McConnell*, 13 Peters, 136; *Carley v. Vance*, 17 Mass. 389; *Watkins v. Crouch*, 5 Leigh, 522; *Ruggles v. Patten*, 8 Mass. 480; *Allen v. Smith's Admr.*, 4 Harring. 234; *Dougherty v. Western Bank of Georgia*, 13 Georg. 288; *Ripka v. Pope*, 5 Louis. Ann. 61; *Blair v. Bank of Tenn.*, 11 Humph. 84; *Weed v. Van Houten*, 4 Halst. 189; *McNairy v. Bell*, 1 Yerg. 502; *Mulherin v. Hannum*, 2 Id. 81; *Bacon v. Dyer*, 3 Fairfield, 19; *Remick v. O'Kyle*, Id. 340; *Irvine v. Withers*, 1 Stew. (Ala.) 234; *Eldred v. Hawes*, 4 Conn. 465; *Waite, J.*, in *Jackson v. Packer*, 13 Id. 358; *Payson v. Whitcomb*, 15 Pick. 212; *Sumner v. Ford*, 3 Arkansas, 389; *Green v. Goings*, 7 Barb. Sup. Ct. 652. *Contrâ*, per *Story, J.*, *Picquet v. Curtis*, 1 Sumner, 478. If the bill or note be payable at a particular place, *on demand*, then, according to *Savage, C. J.*, in *Caldwell v. Cassidy*, 8 Cowen, 271, demand is necessary. This is denied in *Dougherty v. Western Bank of Geo.*, 13 Georg.

287; but it is there decided that bank notes are exceptions to the general rule, on the ground of public policy, and demand upon them must be made. This may however be doubted.

(*u*) *Wolcott v. Van Santvoord*, 17 Johns. 248; *Wallace v. McConnell*, 13 Pet. 136; *Savage, C. J.*, in *Haxtun v. Bishop*, 3 Wend. 21; *Wilde, J.*, in *Carley v. Vance*, 17 Mass. 392; *Caldwell v. Cassidy*, 8 Cowen, 271.

(*v*) See 3 Kent's Comm. 97, 99; *Picquet v. Curtis*, 1 Sum. 478; *Gale v. Kemper's Heirs*, 10 Louis. 205; *Warren v. Allnutt*, 12 Louis. 454; *Bacon v. Dyer*, 12 Maine, 19.

(*w*) *Williams v. Waring*, 10 B. & C. 2. This was an action of assumpsit on a promissory note by the indorsee against the maker. The note was in the following form:—"31st Jan. 1827. Two months after date I promise to pay to A. B. £25, value received. J. Waring. At Messrs. B. & Co.'s, Bankers, London." The note was in the handwriting of the defendant, the maker, and the memorandum was written at the time the note was made. For the defendant it was contended that the note should have been described in the decla-

places, presentment at any one of them will be sufficient. (*ww*) It has been held that where a note was made payable at a certain house, and the occupant of the house was himself the holder of the note at its maturity, it was demand enough if he examined his accounts, and refusal enough if he had no balance in his hands belonging to the party bound to pay. (*x*)

SECTION VIII.

OF WHOM, AND WHEN, AND WHERE THE DEMAND SHOULD BE MADE.

Demand of payment should be made by the holder, or his authorized agent, of the party bound to pay, or his authorized agent; (*y*) and at his usual place of residence, or usual *place of business; if the former, within such hours as may be reasonably so employed, and if the latter in business hours. And if the holder finds the dwelling-house or place of business of the payor closed, so that he cannot enter the same, and after due inquiry cannot find the payor, the prevalent doctrine in this country is, that he may treat the bill or note as dishonored. (*z*) If the payor has changed his residence to

ration as payable at Messrs. B. & Co.'s, and that evidence of presentment there should have been given. The judge overruled the objection, but gave leave to move to enter a nonsuit. It was moved accordingly, and contended that the memorandum was as much parcel of the contract as if it had been in the body of the instrument, and that therefore presentment at the house where the note was made payable should have been averred and proved. Lord *Tenterden*, C. J.: "In point of practice, the distinction between mentioning a particular place for payment of a note, in the body and in the margin of the instrument, has been frequently acted on. In the latter case it has been treated as a memorandum only, and not as a part of the contract; and I do not see any sufficient reason for departing from that course." *Bayley*, J., cited the case of *Exon v. Runell*, 4 M. & S. 505, as being

sufficient to decide this case in favor of the plaintiff. See also *Morris v. Husson*, 4 Sandf. 93.

(*ww*) *Langley v. Palmer*, 30 Maine, 467.

(*x*) *Saunderson v. Judge*, 2 H. Bl. 509.

(*y*) Lord *Kenyon*, in *Cooke v. Callaway*, 1 Esp. 115.—And a person in possession of a bill, payable to his own order, is a holder for this purpose. *Smith v. McClure*, 5 East, 476, 2 Smith, 43; ——— *v. Ormston*, 10 Mod. 286.—A demand by a notary is sufficient. *Hartford Bank v. Stedman*, 3 Conn. 489; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Smith*, 18 Johns. 230.—Parol authority to an agent to demand payment is sufficient. *Shed v. Brett*, 1 Pick. 401.

(*z*) *Hine v. Allely*, 4 B. & Ad. 624; *Shed v. Brett*, 1 Pick. 413; *Williams v. Bank of United States*, 2 Peters, 96;

some other place within the same State, the holder must endeavor to find it and make demand there; but if he have removed out of the State, subsequent to making the note, the demand may be made at his former residence. (a) The presumption is that the holder lives where he dates the note, and demand must be made there, unless when the note falls due the payor resides elsewhere within the State, and the holder knows it, and then the holder must make the demand there. (b)

The whole law in respect of demand and notice is very much influenced by the usage of particular places; where such usage is so well established and so well known that persons may be supposed to contract with reference to it. Of this the English rule in relation to checks on bankers affords an instance, (c) and also the usage of the banks of our different cities as to notes discounted by them, or left with them for collection. In this country the practice is not uniform;

Ogden v. Cowley, 2 Johns. 274; *Fields v. Mallett*, 3 Hawkes, 465; *Buxton v. Jones*, 1 Mann. & Gr. 83.—It has been said, however, that in such case some inquiry or effort ought to be made to find the maker. *Ellis v. Commercial Bank*, 7 Howard, (Miss.) 294; *Sullivan v. Mitchell*, 1 Car. Law Rep. 482; *Collins v. Butler*, Str. 1087.

(a) *Anderson v. Drake*, 14 Johns. 114; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Gillespie v. Hannah*, 4 McCord, 503; *Reid v. Morrison*, 2 Watts & Serg. 401; *Wheeler v. Field*, 6 Met. 290; *Nailor v. Bowie*, 3 Maryl. 251.

(b) *Fisher v. Evans*, 5 Binney, 541; *Nailor v. Bowie*, 3 Maryl. 251; *Lowery v. Scott*, 24 Wend. 358. See, also, on this subject, *Taylor v. Snyder*, 3 Denio, 145. A note, specifying no place of payment, was dated, made, and indorsed in the State of New York, but the maker and indorser resided in Mexico, and continued to reside there when the note fell due, their place of residence being known to the payee and holder, both when the note was given and when it matured; and it was held that a demand of payment on the maker and a notice to the indorser were necessary to charge the indorser. *Spies v. Gilmore*, 1 Barb. Sup. Ct. 158; and affirmed on appeal, 1 Comst. 321.

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(c) *Robson v. Bennett*, 2 Taunt. 388. By the practice of the London bankers, if one banker who holds a check drawn on another banker presents it after four o'clock, it is not then paid, but a mark is put on it, to show that the drawer has assets, and that it will be paid; and checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing-house; held, that a check presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking house of the drawee. Such a marking, under this practice, amounts to an acceptance, payable next day at the clearing-house. It is not necessary to present for payment a check payable on demand till the day following the day on which it is given. A person receiving a check on a banker is equally authorized in lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade. Although in consequence thereof the notice of its dishonor is postponed a day, one day being allowed for notice from the payee to the drawer, after the day on which notice is given by the bankers to the payee. See *Bancroft v. Hall*, Holt, N. P. 476; *Henry v. Lee*, 2 Chitty, 124.

but, in general, a demand is made some days before the maturity of a note, by a notice post-dated on the day of maturity, omitting the days of grace. But it is usual also, if the note be not paid on the last day of grace, to make a formal demand on that day, after business hours. Bills and notes sometimes express days of grace, but generally not. Usually, and in some States by statutory provisions, all bills and notes on time, when grace is not expressly excluded, are entitled to grace. (*d*) But notes payable on demand are not entitled to grace, (*e*) nor are checks on banks, though payable on time. (*ee*)

It sometimes happens that when a bill is drawn in one country, and made payable in another, the laws in relation to presentment and demand differ in those countries; and then the question arises, which law shall prevail. It would seem that in England the law of the place in which it is payable prevails; (*f*) but in this country it has been decided that the *law of the country in which the bill is indorsed shall govern

(*d*) *Corp v. McComb*, 1 Johns. Cas. 328; *Jackson v. Richards*, 2 Caines, 343. In the absence of proof to the contrary, the legal presumption is, that in every State in the Union three days grace are allowed by law on bills of exchange and promissory notes. *Wood v. Corl*, 4 Met. 203. In this case, *Shaw, C. J.*, said:—"We consider it well settled, that by the general law merchant, which is part of the common law, as prevailing throughout the United States, in the absence of all proof of particular contract or special custom, three days of grace are allowed on bills of exchange and promissory notes; and when it is relied upon that by special custom no grace is allowed, or any other term of grace than three days, it is an exception to the general rule, and the proof lies on the party taking it." See also *Bussard v. Levering*, 6 Wheat. 102; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. United States Bank*, 11 Wheat. 431; *Cook v. Darling*, 2 R. I. 385.—The days of grace on negotiable notes constitute a part of the original contract. *Savings Bank v. Bates*, 8 Conn. 505, but the notes may be declared on according to their terms without adding the days of grace. *Padwick v. Turner*,

11 Q. B. 124.—Whenever the maker of a note is entitled to grace, the indorser has the same privilege. *Pickard v. Valentine*, 13 Maine, 412; *Central Bank v. Allen*, 16 Maine, 41.

(*e*) *In re Brown*, 2 Story, 503; *Salter v. Burt*, 20 Wend. 205; *Somerville v. Williams*, 1 Stewart, 484; *Cammer v. Harrison*, 2 McCord, 246.

(*ee*) *Bowen v. Newell*, 5 Sanf. 326.

(*f*) *Rothschild v. Currie*, 1 Q. B. 43. This was an action by an indorsee against the payee and indorser of a bill of exchange, drawn in England on and accepted by a French house, both plaintiff and defendant being domiciled in England; *Held*, that due notice of the dishonor of the bill by the acceptor was parcel of the contract; that the bill being made payable by the acceptor abroad was a foreign bill, and the *lex loci contractus* must therefore prevail; and that it was sufficient for plaintiff to show that he had given defendant such notice of the dishonor and protest, as was required by the law of France. In *Gibbs v. Fremont*, 20 E. L. & E. 555, the case of *Rothschild v. Currie*, is, however, referred to by *Alderson, B.*, as of questionable authority.

exclusively as to the liabilities and duties of the indorsers, on the ground that every indorsement is substantially a new contract. (*g*)

* SECTION IX.

OF NOTICE OF NON-PAYMENT.

Where a bill is not accepted, or a bill or note is not paid at maturity, by the party bound then to pay it, all subsequent parties must have immediate notice of this fact. Even a verbal agreement of the parties to waive notice may not render it unnecessary; (*h*) but it is sometimes waived in writing, and this usually on the note; as by the words, "I waive demand and notice;" and such waiver is sufficient. (*hh*) A waiver of demand alone should operate as a waiver of notice, for if demand of payment is not made because unnecessary, a notice can hardly be necessary or useful; but a waiver of notice alone is not a waiver of demand, for though the party waiving may not wish for notice of the non-payment, he may still claim that payment should be demand-

(*g*) *Aymer v. Sheldon*, 12 Wend. 439. In this case it was held, that the indorsee of a bill of exchange, payable a certain number of days after sight, drawn in a *French West India Island*, on a mercantile house in Bordeaux, and transferred in the city of New York by the payee, need not present the bill for payment after protest for non-acceptance, notwithstanding that by the *French code de commerce* the holder is not excused from the protest for non payment by the protest for non-acceptance; and loses all claim against the indorser, if the bill be not presented for protest for non-payment. In such a case the payee of the bill is bound to conform to the *French law* in respect to bills of exchange, to enforce his remedies against the drawers; but not so the indorsee; he is only required to comply with the law merchant prevailing here, the indorsement having been made in the city of New York; and according to which his right of action is perfect, after protest for

non-acceptance. See also *Hatcher v. McMorine*, 4 Dev. 122.

(*h*) It is so intimated in some English cases. *Free v. Hawkins*, Holt, 550, 8 Taunt. 92. But see *Drinkwater v. Tebbetts*, 17 Maine, 16; *Boyd v. Cleveland*, 4 Pick. 525; *Taunton Bank v. Richardson*, 5 Pick. 437; *Fuller v. McDonald*, 8 Greenl. 213; *Marshall v. Mitchell*, 35 Maine 221; *Farmers Bank v. Waples*, 4 Harring. 429; *Hoadley v. Bliss*, 9 Georgia 303; *Lary v. Young*, 8 Eng. (Ark.) 402.—Although a bill or note has been indorsed long after it is overdue, there must still be a demand and notice of default in order to charge the indorser, because a bill or note, although overdue, does not cease to be negotiable. *Dwight v. Emerson*, 2 New Hamp. 159; *Berry v. Robinson*, 9 Johns. 121; *Greely v. Hunt*, 21 Maine, 455; *Kirkpatrick v. McCulloch*, 3 Humphreys, 171; *Adams v. Torbert*, 6 Ala. 865.

(*hh*) *Woodman v. Thurston*, 8 Cush. 159.

ed. (i) And no waiver affects any party but him who makes it. It was formerly held that a neglect to give notice would not support a defence to a bill, unless injury could be proved; but it is now well settled that the law presumes injury. (j)

The omission to give such notice may, however, be excused, by circumstances which rendered it impossible, or nearly so. The absconding or absence beyond reach of the party to be notified, (k) or the death or sufficient illness of the party bound to give notice, or any sufficient accident or obstruction. But nothing of this kind is a sufficient excuse, provided the notice could have been given by great diligence and earnest endeavor, for so much is required by the law. (l)

* In general, the notice must be given within a reasonable time; and what this time is, is a question of law for the court, (m) and each case will be judged by its circumstances. It may not, perhaps, be proper to say that there is a positive rule of law on the subject, but from the usage in commercial places, and the weight of authorities, it may be gathered, that notice of non-payment *may* be given to parties liable to pay,

(i) *Drinkwater v. Tebbetts*, 17 Maine, 46; *Lane v. Steward*, 20 Maine, 98; *Berkshire Bank v. Jones*, 6 Mass. 524; *Buchanan v. Marshall*, 22 Verm. 561; See also *Union Bank v. Hyde*, 3 Wheat. 572; *Coddington v. Davis*, 3 Den. 16; *Bird v. LeBlanc*, 6 Louis. Ann. 470.

(j) *Dennis v. Morrice*, 3 Esp. 158; *Norton v. Pickering*, 8 B. & C. 610; *Hill v. Heap*, Dowl. & Ry. N. P. C. 59; *De Berdt v. Atkinson*, 2 H. Bl. 336.—But in *Terry v. Parker*, 6 Ad. & El. 502, it was held, that if the drawer of a bill of exchange have no effects in the hands of the drawee at the time of the drawing of the bill, and of its maturity, and have no ground to expect that it will be paid, it is not necessary to present the bill at maturity; and if it be presented two days afterwards, and payment be refused, the drawer is liable, and the case of *De Berdt v. Atkinson* is denied to be correct. And see ante, page 225, note (p.)

(k) *Walwyn v. St. Quintin*, 2 Esp. 516, 1 B. & P. 652; *Bowes v. Howe*, 5 Taunt. 30. And see *Crosse v. Smith*, 1 Maule & Selwyn, 545; *Bruce v. Lytle*, 13 Barb. 163; *Chitty & Hulme on*

Bills, p. 452.—So war between one country and the country where the note is payable excuses *immediate* notice; but notice should be given within reasonable time after peace. *Hopkirk v. Page*, 2 Brock. 20; *Griswold v. Waddington*, 16 Johns. 438; *Scholefield v. Eichelberger*, 7 Peters, 586.

(l) A party is bound to use *reasonable*, but not *excessive* diligence. *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Bender*, 21 Wend. 643; *Clark v. Bigelow*, 16 Maine, 246; *Roberts v. Mason*, 1 Ala. (N. S.) 373; *Preston v. Daysson*, 7 Louis. 7; *Runyon v. Montford*, 1 Busbee's Law 371.—If due diligence be used it will be sufficient, although notice should be sent to the wrong place. *Burmester v. Barrow*, 9 E. L. & E. 402; *Nichol v. Bate*, 7 Yerg. 305; *Barr v. Marsh*, 9 Yerg. 253; *Phipps v. Chase*, 6 Met. 491; *Barker v. Clarke*, 20 Maine, 156.

(m) *Hussey v. Freeman*, 10 Mass. 84; *Nash v. Harrington*, 2 Aikens, 9; *Haddock v. Murray*, 1 New Hamp. 140; *Sussex Bank v. Baldwin*, 2 Harrison, 488; *Bank of Utica v. Bender*, 21 Wend. 643; *Remer v. Downer*, 23 Id.

on the same day on which payment has been refused; (*n*) either personally or by mail, as may be proper under the circumstances; and that it *should* be given as soon as on the day following that on which payment has been refused; (*nn*) or by the mail of the same day, or by the next mail afterwards, provided no convenient or usual means intervene. Where there is but one mail departing upon the day succeeding the default, notice must be sent thereby unless it depart before ordinary business hours on that day. (*o*) But if there be more than one mail it seems to be considered that it is sufficient if the notice be deposited in time to go by any mail of that day. (*oo*) In London it may be sent by penny post to parties residing there. If the party live out of town, then it may be sent to the post-office nearest to his residence, (*p*) or it may be sent to the post-office where the party

620. — It seems to be in some respects partly a question of law and partly of fact. See *Taylor v. Bryden*, 8 Johns. 173; *Ferris v. Saxton*, 1 Southard, 1; *Scott v. Alexander*, 1 Wash. 335; *Dodge v. Bank of Kentucky*, 2 Marsh. 616.

(*n*) *Burbridge v. Manners*, 3 Campb. 193; *Bussard v. Levering*, 6 Wheaton, 102; *Corp v. McComb*, 1 Johns. Cas. 328; *Farmers Bank v. Duvall*, 7 G. & J. 79; *Smith v. Little*, 10 New Hamp. 526; *McClane v. Fitch*, 4 B. Monroe, 599.

(*nn*) If the parties reside in the same town, notice given at any time on the next day after the default is sufficient. *Grand Bank v. Blanchard*, 23 Pick. 305; *Remington v. Harrington*, 8 Ohio, 507; *Whittlesey v. Dean*, 2 Aikens, 263.

(*o*) *Lennox v. Roberts*, 2 Wheat. 373; *Seventh Ward Bank v. Hanrick*, 2 Story, 416; *Davis v. Hanly*, 7 Eng. (Ark.) 647; *Lawson v. Farmers Bank*, 1 Ohio State Reps. 207; *Hartford Bank v. Stedman*, 3 Conn. 489; *Howard v. Ives*, 1 Hill, 263; *Whitwell v. Johnson*, 17 Mass. 449; *Mitchell v. Degrand*, 1 Mason, 176; *United States v. Barker*, 4 Wash. C. C. 465; *Chick v. Pillsbury*, 24 Maine, 458; *Downs v. Planters Bank*, 1 S. & M. 261.

(*oo*) *Whitwell v. Johnson*, 17 Mass. 449; *Housatonic Bank v. Laffin*, 5 Cush. 550; *Story on Notes*, § 324; *Carter v. Burley*, 9 N. H. 558.

(*p*) *Scott v. Lifford*, 9 East, 347; *Dunlap v. Thompson*, 5 Yerger, 67;

Spann v. Baltzell, 1 Flor. 302. — But in *Pierce v. Pendar*, 5 Met. 352, it was held, that when both parties resided in the same town, notice could not be given through the post-office, and *Shaw, C. J.*, thus remarked upon this point: — “The only remaining question then is, whether notice by the post-office was sufficient. The *general rule* certainly is, that when the indorser resides in the same place with the party who is to give the notice, the notice must be given to the party personally, or at his domicile or place of business. Perhaps a different rule may prevail in London, where a penny post is established and regulated by law, by whom letters are to be delivered to the party addressed, or at his place of domicile or business, on the same day they are deposited. And perhaps the same rule might not apply, where the party to whom notice is to be given lives in the same town, if it be at a distinct village or settlement where a town is large, and there are several post-offices in different parts of it. But of this we give no opinion. In the present case the defendant had his residence and place of business in the city of Bangor, and the only notice given him was by a letter, addressed to him at Bangor, and deposited in the post-office at that place. And we are of opinion that this was insufficient to charge him as indorser.” In *Green v. Farley*, 20 Ala. 322, where both indorser and holder resided in

usually receives his letters, although not his actual place of residence. (*pp*) And where notice may be properly given through the post-office, it is sufficient if the notice be deposited in the office although it is never received by the indorser. (*pq*) And where an indorser receives notice, and is bound to give notice to other parties as the condition of making them liable to him, he comes under the same rule, and *each successive indorser has until the next day to give such notice. (*q*) If a bill is sent to an agent for collection he is treated as a holder of the note for the purpose of giving notice, and his principal has the same time for notifying his indorsers after receiving notice from the agent, as if himself an indorser receiving notice from an indorsee. (*qq*)

If Sunday or any other day intervene, which by law or by established usage is not a day of business, then it is not counted, and the obligation as to notice is the same as if it fell on the succeeding day. (*r*) If a note or bill payable without grace falls due on such a day, it is not payable until the next day. But if the last day of grace falls upon such a day, then it is payable on the day before; for the days of grace are regarded as matters of favor, and are abridged instead of being lengthened by the intervention of such a day. (*s*)

The purpose of notice is, that the party receiving it may obtain security from the party liable to him, for the sum for which he is liable to other parties. No precise form is neces-

Montgomery, but the acceptor resided in Mobile, and the note was there protested, it was held that notice to the indorser sent by the notary through the post-office was sufficient. And see *Bell v. Hagerstown Bank*, 7 Gill, 216; *Morton v. Westcott*, 8 Cush. 425.

(*pp*) *Morris v. Husson*, 4 Sandf. 94.

(*pq*) *Bell v. Hagerstown Bank*, 7 Gill, 216; *Sasscer v. Farmers Bank*, 4 Maryl. 409.

(*q*) *Darbyshire v. Parker*, 6 East, 3; *Smith v. Mullett*, 2 Camp. 208; *Jameison v. Swinton*, 2 Camp. 374; *Brown v. Ferguson*, 4 Leigh, 37. This rule is so well settled that, although the party receiving notice may easily have forwarded it the same day, yet he is not under obligation to send it until the next post

after the day of its reception. *Geill v. Jeremy*, Mood. & Mal. 61. See *Hilton v. Shepherd*, 6 East, 14, in notis.

(*qq*) *Bank of U. S. v. Davis*, 2 Hill, 451; *Church v. Barlow*, 9 Pick. 547; *Lawson v. Farmers Bank*, 1 Ohio State Reps. 206.

(*r*) *Eagle Bank v. Chapin*, 3 Pick. 180; *Agnew v. Bank of Gettysburg*, 2 Harris & Gill, 479; *Hawkes v. Salter*, 4 Bing. 715; *Wright v. Shawcross*, 2 B. & Ald. 501, in notis; *Bray v. Hadwen*, 5 M. & S. 68. So of public holidays. *Cuyler v. Stevens*, 4 Wend. 566; *Lindo v. Unsworth*, 2 Camp. 602.

(*s*) Where days of grace are allowed, and the last of them falls on Sunday, the fourth of July, or other public holiday, the bill or note is payable the day

sary; but it must be consonant with the facts, and state distinctly the dishonor of the bill, and either expressly or by an equivalent implication, that the party to whom the notice is * sent is looked to for the payment. (*t*) And it is held by the best authority, that this implication arises from the actual notice of dishonor. (*tt*) Nor will a slight mistake in the name or description of the note or party vitiate the notice, unless the party receiving it is misled thereby. (*u*) Any party may give notice, and it will enure to the benefit of every other party, (*uu*) provided the party giving the notice be

before. *Ransom v. Mack*, 2 Hill, 588; *Cuyler v. Stevens*, 4 Wend. 566; *Sheldon v. Benham*, 4 Hill, 129; *Homes v. Smith*, 20 Maine, 264; *Tassell v. Lewis*, 1 Ld. Raym. 743; *Haynes v. Birks*, 3 B. & P. 599; *Bussard v. Levering*, 6 Wheat. 102; *Adams v. Otterback*, 15 How. 539; *Lewis v. Burr*, 2 Caines's Cas. in Error, 195; *Barlow v. Planters Bank*, 7 Howard, (Miss.) 129; *Offut v. Stout*, 4 J. J. Marshall, 332. But if no grace is allowed, and the day on which the bill or note by its terms falls due is a holiday, it is not payable until the day after. *Salter v. Burt*, 20 Wend. 205; *Avery v. Stewart*, 2 Conn. 69; *Delamater v. Miller*, 1 Cowen, 75; *Barratt v. Allen*, 10 Ohio, 426. — If, however, the nominal day of payment in an instrument, which is entitled to grace, happens to fall on a Sunday or a holiday, the days of grace are the same as in other cases, and payment is not due until the third day after. *Wooley v. Clements*, 11 Ala. 220.

(*t*) *Hartley v. Case*, 4 B. & C. 339; *Solarte v. Palmer*, 7 Bing. 530; *Boulton v. Welsh*, 3 Bing. N. C. 688, remarked upon in *Houlditch v. Cauty*, 4 Id. 411; *Grugeon v. Smith*, 6 Ad. & El. 499; *Strange v. Price*, 10 Id. 125; *Cooke v. French*, Id. 131; *Furze v. Sharwood*, 2 Q. B. 388; *King v. Bickley*, Id. 419; *Robson v. Curlew*, Id. 421; *Hodger v. Stevenson*, 2 Mees. & Wels. 799; *Lewis v. Gompertz*, 6 Id. 399; *Bailey v. Porter*, 14 Id. 44; *Messenger v. Southey*, 1 Man. & Gr. 76; *Armstrong v. Christiani*, 5 C. B. 687; *Everard v. Watson*, 18 E. L. & E. 194; *Barstow v. Hiriart*, 6 Louis. Ann. 98; *Denegre v. Hiriart*, Ib. 100; *Cook v. Litchfield*, 5 Sandf. 330; *Beals v. Peck*, 12 Barb. 245; *Spann v. Baltzell*, 1 Flor.

302; *Reedy v. Seixas*, 2 Johns. Cas. 337; *United States Bank v. Carneal*, 2 Pet. 543; *Mills v. Bank of United States*, 11 Wheat. 431; *Shed v. Brett*, 1 Pick. 401; *Gilbert v. Dennis*, 3 Met. 495; *Pinkham v. Macy*, 9 Id. 174; *Dole v. Gold*, 5 Barb. Sup. Ct. 490; *De Wolf v. Murray*, 2 Sand. Sup. Ct. 166; *Smith v. Little*, 10 New Hamp. 526; *Cowles v. Harts*, 3 Conn. 516; *Wheaton v. Wilmarth*, 13 Met. 423; *Cayuga County Bank v. Warden*, 1 Const. 413; *Platt v. Drake*, 1 Doug. (Mich.) 296; *Spies v. Newberry*, 2 Id. 425; *Bank of Cape Fear v. Sewell*, 2 Hawks, 560. See also 1 Am. Leading Cases, 231–237; *Boehme v. Carr*, 3 Maryl. 202; *Farmers Bank v. Bowie*, 4 Maryl. 290; *Woodin v. Foster*, 16 Barb. 146.

(*tt*) *Chard v. Fox*, 14 Q. B. 200; *Graham v. Sangston*, 1 Maryl. 60; *Mills v. Bank of United States*, 11 Wheat. 431; *Metcalf v. Richardson*, 20 E. L. & E. 301.

(*u*) *Mellersh v. Rippen*, 11 E. L. & E. 599; *Smith v. Whiting*, 12 Mass. 6; *Tobey v. Lennig*, 14 Penn. 483; *Cayuga County Bank v. Warden*, 2 Seld. 19; *Snow v. Perkins*, 2 Mich. 239; *Housatonic Bank v. Laflin*, 5 Cush. 546.

(*uu*) *Chapman v. Keane*, 3 Ad. & El. 193, overruling *Tindal v. Brown*, 1 T. R. 167, 2 Id. 186, n., and *Ex parte Barclay*, 7 Ves. 597; *Beal's Admr. v. Alexander*, 6 Tex. 531. But the notice must be given by a party to the bill. If given by a stranger it will not suffice. *Jameison v. Swinton*, 2 Camp. 373; *Chanoine v. Fowler*, 3 Wend. 173; *Wilson v. Swabey*, 1 Stark. 34. So in case of non-acceptance, notice to the drawer by the drawee will not avail, for the latter is not a party. *Stanton v. Blossom*, 14 Mass. 116.

himself the holder or an indorser already fixed by notice, (*uv*) and gives the notice to the party sought to be charged, within one day after the dishonor, or after receiving notice himself. (*uw*) But notice given to one party does not hold another; thus if a second indorser having notice, and thereby being bound, neglects to give notice to the first indorser, the latter would not be liable. (*v*)

After the holder of a dishonored bill or note has given due notice to indorsers, he may indulge the acceptor or maker with forbearance or delay, without losing his claim on the indorsers, provided he retains the power of enforcing payment at any moment. (*w*) But if he makes a bargain for delay, promising it on a consideration which makes the promise binding, or under his seal, this destroys his claim against the indorsers. (*x*) The reason is, that he ought not to claim payment of the indorsers, unless, on payment, he could transfer to them the bill or note, with a full right to enforce payment at once from the acceptor or maker. But he * could give them no such right if he had, for good consideration, given to the acceptor or maker his promise that they should not be sued.

It has been a subject of some discussion whether the above rule applies in cases of assignments in insolvency. Bankrupt and insolvent laws usually provide that the discharge of the bankrupt or insolvent shall not discharge his indorsers or sureties; and it is sometimes attempted to effect the same result in voluntary assignments in insolvency. The indentures contain a provision that the creditors who become par-

(*uv*) *Lysaft v. Bryant*, 9 Com. B. 46.

(*uw*) *Brown v. Ferguson*, 4 Leigh, 37; *Simpson v. Turney*, 5 Humph. 419. See also *Turner v. Leech*, 4 B. & Ald. 451; *Rowe v. Tipper*, 20 E. L. & E. 220, and note.

(*v*) *Morgan v. Woodworth*, 3 Johns. Cas. 90.

(*w*) *Pole v. Ford*, 2 Chitty, 125; *Philpot v. Briant*, 4 Bing. 717; *Badnall v. Samuel*, 3 Price, 521; *Walwyn v. St. Quintin*, 1 B. & P. 652; *McLemore v. Powell*, 12 Wheat. 554; *Bank v. Myers*, 1 Bailey, 412; *Planters Bank c. Sellman*, 2 Gill & Johns. 230; *Gahn*

v. Niemcewicz, 11 Wend. 312; *Frazier v. Dick*, 5 Rob. (Louis. Rep.) 249; *Walker v. Bank of Mont. Co.* 12 Serg. & Rawle, 382; *Freeman's Bank v. Rolins*, 13 Maine, 202.

(*x*) *Clarke v. Henty*, 3 Y. & C. 187; *Greely v. Dow*, 2 Met. 176; *Wharton v. Williamson*, 13 Penn. 273. See also *Moss v. Hall*, 5 Exch. 46. Unlike, however, the case of a surety, a party liable on a bill as indorser will not be discharged, though the party for whom he is bound take security of the acceptor and then release it without his consent. *Hurd v. Little*, 12 Mass. 503; *Pitts v. Congdon*, 2 Comst. 352.

ties to them discharge the insolvent; but they also contain a further provision that the indorsers or sureties shall not be discharged. And the question has been whether the indorsers or sureties are discharged notwithstanding this provision. But we think the reason of the rule which discharges them, does not hold in this case. For where the debtor himself stipulates that his discharge shall not prevent his creditors from having recourse to his indorsers or sureties, it must be understood that he binds himself not to oppose such discharge to a suit against himself by the indorsers or sureties, if they are held liable to his creditors by reason of a provision which he himself expressly makes. The reason, therefore, fails, which generally makes his discharge their discharge. And, it may be added, that it is for their benefit that this provision should be carried into effect. For if his discharge necessarily operated their discharge, creditors would naturally prefer a claim against them to the dividend of an insolvent, and would therefore take nothing from him, but all from them. Whereas if this clause permits them to get what they can from the insolvent, and look to the indorsers or sureties only for the balance, they would always do so, and the sureties would have the benefit of whatever was paid by way of dividend. (y)

*SECTION X.

OF PROTEST.

If a foreign bill be not accepted, or not paid at maturity, it must be protested at once; and this should be done by a notary public, to whose official acts, under his seal, full faith is given in all countries. (z) Inland bills are generally, and

(y) *Parke, B., Kearsley v. Cole*, 16 M. & W. 135; *Ex parte Gifford*, 6 Ves. 805; *Boulton v. Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck's Cases in Bankruptcy, 517; *Nicholson v. Revill*, 4 Ad. & Ell. 675; *Lewis v. Jones*, 4 B. & C. 506, and note; *Nichols v. Norris*, 3 B. & Ad. 41; *Clagett v. Salmon*, 5 Gill & Johns. 314; *Owen v. Homan*, 3

E. L. & E. 112; *Solier v. Loring*, 6 Cush. 537.

(z) *Gale v. Walsh*, 5 T. R. 239; *Bryden v. Taylor*, 2 Har. & Johns. 396; *Townsley v. Sumrall*, 2 Pet. 170. And the duty of the notary cannot be performed by an agent or clerk. *Onondago County Bank v. Bates*, 3 Hill 53; *Cole v. Jessup*, 9 Barb. 395.

promissory notes very often protested in like manner, but this is not required by the law merchant, (a) and the notary's certificate of protest would not in such case be evidence of dishonor. (aa) If the bill be protested for non-acceptance by the drawee, any third person may intervene, and accept or pay the bill, for the honor of the drawer or of any indorser; and such acceptance *supra protest* has the same effect as if the bill had been drawn on him. He is liable in the same way, and he has his remedy against the person for whom he accepts, and all prior parties with notice; and if he pays the bill for an indorser he stands in the position of an indorsee for value. (b) And this is true although the acceptance is at the request and for the *honor of the drawee after his refusal. (c) The holder is not bound to receive an acceptance *supra protest*, (d) but must receive payment if tendered to him *supra protest*. But after a general acceptance by the drawee there can be no acceptance *supra protest*, and a third party can only add his credit to the bill by a collateral guaranty. (e) If the bill designates a third party to whom recourse is to be had on non-acceptance, it is said that this direction must be obeyed. (f)

(a) *Windle v. Andrews*, 2 B. & Ald, 696; *Bonar v. Mitchell*, 5 Exch. 415; *Young v. Bryan*, 6 Wheat. 146; *Burke v. McKay*, 2 How. U. S. 66.—Whether a bill drawn in one of the United States upon persons resident in another be a foreign bill so as to require a protest in case of non-acceptance or non-payment, is a question concerning which there has been a difference of judicial opinion. It has been held in New York and Connecticut that such bills are not foreign. *Miller v. Hackley*, 5 Johns. 375; *Bay v. Church*, 15 Conn. 15. But the case in New York has been since overruled in the same jurisdiction; and in the other States where the question has arisen, and in the Supreme Court of the United States, a contrary opinion has been held. *Duncan v. Course*, 1 Const. Rep. 100; *Cape Fear Bank v. Stine-metz*, 1 Hill, (S. C.) 44; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Brown v. Ferguson*, 4 Leigh, 37; *Halliday v. McDougall*, 20 Wend. 81; *Carter v. Burley*, 9 N. H. 558; *Buckner v. Finley*, 2 Pet. 586. This is in accordance

with the doctrine of *Mahony v. Ashlin*, 2 B. & Ad. 478, where a bill drawn in Ireland upon a person resident in England was held to be a foreign bill.

(aa) *Union Bank v. Hyde*, 6 Wheat. 574; *Taylor v. Bank of Illinois*, 7 Mon. 580; *Bank of U. S. v. Leathers*, 10 B. Mon. 64; *Carter v. Burley*, 9 N. H. 558.

(b) *Holt*, C. J., in *Mutford v. Walcot*, 1 Ld. Raym. 574; *Mertens v. Winnington*, 1 Esp. 112; *Goodall v. Polhill*, 1 C. B. 233; *Geralopulo v. Wieler*, 3 E. L. & E. 515; *Wood v. Pugh*, 7 Ohio, Part 2, 164; *Baring v. Clark*, 19 Pick. 220. The payer *supra protest* for the honor of the indorser cannot hold such indorser liable, if he have already been discharged by reason of want of notice of the non-acceptance. When a party has once been exonerated, his liability cannot be revived without his assent. *Higgins v. Morrison*, 4 Dana, 100.

(c) *Konig v. Bayard*, 1 Pet. 250.

(d) *Mitford v. Walcot*, 12 Mod. 410.

(e) *Jackson v. Hudson*, 2 Camp. 447.

(f) *Story on Bills of Exchange*, §§ 65, 219.

SECTION XI.

OF DAMAGES FOR NON-PAYMENT OF BILLS.

If a bill of exchange be not paid at maturity, the holder may at once redraw on the drawer or indorser, not only for the face of the bill, but for so much more as shall indemnify him; and therefore for so much as shall cover the necessary costs of protest, notice, commissions, and whatever further loss he sustains by the current rate of exchange on the place where the drawer or indorser resided. (*g*) This is the rule of the law merchant; but in this country, instead of reëxchange, or damages to be ascertained by a reference to the above items of loss, established rates of damage are fixed by statute or by usage. (*h*) These rates are larger in proportion to the distance of the place where the drawee resides, from the place where the bill is drawn. And it may be regretted that more uniformity does not prevail among the several States in relation to this matter. It seems to be settled by the weight of authority, that, in determining the amount of reëxchange, the actual or mercantile par or valuation of money *should be regarded, and not the mere legal or nominal, which, as between this country and England, differs very widely from the true value. (*i*)

SECTION XII.

BILLS OF LADING.

These documents are also by the law merchant now treated

(*g*) *Mellish v. Simeon*, 2 H. Bl. 378; *De Tastet v. Baring*, 11 East, 265; *Graves v. Dash*, 12 Johns. 17, (overruling *Hendricks v. Franklin*, 4 Johns. 119); *Denston v. Henderson*, 13 Id. 322. The holder may also, upon protest for non-acceptance, without waiting for protest upon non-payment, maintain an action against the drawer or indorser, and recover all the customary damages. *Weldon v. Buck*, 4 Johns. 144; *Whitehead v. Walker*, 9 M. & W. 506. But the acceptor is not liable for reëxchange. *Woolsey v. Crawford*, 2 Camp. 445; *Napier v. Schneider*, 12 East, 420; *Sibely v. Tutt*, 1 M'Mullan's Equity Rep. 320.

(*h*) *Hendricks v. Franklin*, 4 Johns. 119, per *Spencer, J.*; *Parsons, C. J.*, in *Grimshaw v. Bender*, 6 Mass. 157.

(*i*) *Scott v. Bevan*, 2 B. & Ad. 78; *Smith v. Shaw*, 2 Wash. C. C. 167; *Grant v. Healey*, 3 Sumner, 523.

as negotiable instruments to a certain extent. The master by signing such bill promises to deliver the goods to A. B. "or his assigns." If A. B. indorses the bill to any person, or in blank, delivering it to any person, that constitutes such person his assignee, and vests in him a property in the goods, and he may claim the goods of the captain or owners in the place of the person putting them on board, and with the same rights. (*j*) But a bill of lading is rather *quasi* negotiable than actually so, the effect of the indorsement being only to transfer the property in the goods and not the right upon the contract itself, and the indorsee cannot maintain an action on the bill itself in his own name, nor an action on the case for the non-delivery of the goods. (*jj*) And a mere memorandum of shipment would not have the force nor the negotiability of a bill of lading, (*k*) nor will the property in goods, for which a bill of lading has been given, pass by a mere delivery of the bill without indorsement, (*l*) or by indorsement without delivery. (*ll*)

SECTION XIII.

OF PROPERTY PASSING WITH POSSESSION.

By the common law, one who has no title to a chattel can give no title, except by a sale in market overt, which is not known in this country. An exception exists in the case of negotiable notes made payable to bearer, or payable to order and indorsed in blank, so as to be transferable by delivery. (*m*)

(*j*) *Lickbarrow v. Mason*, 2 T. R. 71; *Newsom v. Thornton*, 6 East, 41; *Berkley v. Watling*, 7 Ad. & El. 39, 2 Nev. & Per. 178; *Saltus v. Everett*, 20 Wend. 268; *Chandler v. Belden*, 18 Johns. 157; *Ryberg v. Snell*, 2 Wash. C. C. 294. In *Renteria v. Ruding*, 1 Moody & Malk. 511, Lord *Tenterden* said that a bill of lading, in which the word "assigns" did not appear, was nevertheless "an indorsable instrument," and assignable by such indorsement.

(*jj*) *Thompson v. Dominey*, 14 M. & W. 403; *Howard v. Shepherd*, 9 Com.

Bench, 297; *Dows v. Cobb*, 12 Barb. 310; *Lineker v. Ayeshford*, 1 California, 75. See also *Rowley v. Bigelow*, 12 Pick. 314; *Stanton v. Eager*, 16 Pick. 474.

(*k*) See *Jenkyns v. Usborne*, 13 Law J. (N. S.) C. P. 196; *Brandt v. Bowlby*, 2 B. & Ad. 932.

(*l*) *Stone v. Swift*, 4 Pick. 389. But see *Walter v. Ross*, 2 Wash. C. C. 283.

(*ll*) *Buffington v. Curtis*, 15 Mass. 528; *Allen v. Williams*, 12 Pick. 297.

(*m*) *Miller v. Race*, 1 Burr. 452.

We consider that this exception extends to all negotiable instruments which are transferable by mere delivery by any party holding them; and that by delivery thereof, a good title passes "to any person honestly acquiring them;" (n) because the property passes with the possession. It becomes, then, important to determine what are negotiable instruments. If, for example, the bond of a railroad company, payable to bearer, is a negotiable instrument, then a purchaser in good faith holds it not only free from the equitable defences which the company might have made against the first holder, but also against the claims of an owner who may have lost it, or from whom it was stolen. The discussion of this subject belongs rather to the topic of Construction of Contracts, under which it will be more fully considered. It may, however, be said here, that we regard the English authorities as making all instruments negotiable which are payable to bearer and are also customably transferable by delivery, (o) within which definition we suppose that the common bonds of railroad companies would fall. Of the coupons attached, which have no seal, this would seem to be probable. But usage must have great influence in determining this question.

If the owner of a note or bill not negotiable, or specially indorsed to him, lose it, he may, on sufficient proof of its

(n) So said by *Abbott, C. J.*, in *Gorgier v. Mievill*, 3 B. & Cr. 45. In *Clark v. Shee*, Cowper, 197, Lord *Mansfield* puts notes and money on precisely the same footing. "When," says he, "money or notes are paid *bonâ fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mulâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

(o) See *Gorgier v. Mievill*, 3 B. & Cr. 45, and compare it with *Glyn v. Baker*, 13 East, 509. See also *Wookey v. Pole*, 4 B. & Ald. 1; *Grant v. Vaughan*, 3 Burr. 1516, where a draft by a merchant on his banker was held negotiable. This case distinctly confirms the case of *Miller v. Race*. See *Lickbarrow v. Mason*, 5 T. R. 683, respecting bills of

lading, before cited. *Zwinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorrien*, 7 Taunt. 278; *Lang v. Smith*, 7 Bing. 284, in which case it was held that certain *bordereaux* and *coupons*, entitling the bearer to certain portions of the public debt of Naples, were not negotiable, the jury finding that they did not usually pass from hand to hand like money. *Taylor v. Kymer*, 3 B. & Ad. 321, and *Taylor v. Trueman*, 1 Moody & Malk. 453, were decided on the construction of st. 6 G. 4, c. 94. But an instrument for the payment of money *under seal* is not negotiable, although it appear to be so upon its face; at least where any writing is necessary in order to transfer it. *Clark v. Farmers Man. Company*, 15 Wend. 256; *Parke*, Baron, in *Hibblewhite v. McMorine*, 6 Mees. & Wels. 200.

tenor and of his loss, sustain an action at law, because no finder can give good title to any holder by a *bonâ fide* sale to him. (p) But if the paper be negotiable and indorsed in blank, or if it be payable to bearer, then the promisor or indorser may be held liable to an innocent holder for consideration. It follows, therefore, that the promisor or indorser should not be liable to the loser, without sufficient indemnity to him against the possible demand of such innocent purchaser. (q) But courts of law find it difficult to require such indemnity, or to judge of its sufficiency; and therefore, generally at least, they turn the loser over to courts of equity, in which the defendant may be properly secured by adequate indemnity; and then the action will be maintained. (r)

(p) *Wain v. Bailey*, 10 Ad. & El. 616.

(q) *Pierson v. Hutchinson*, 2 Campb. 211; *Hansard v. Robinson*, 7 B. & C. 90; *Clay v. Crowe*, 18 E. L. & E. 514; *Davis v. Dodd*, 4 Taunt. 602; *Poole v. Smith*, 1 Holt, 144; *Rowley v. Ball*, 3 Cow. 303; *Kirby v. Sisson*, 2 Wend. 550. But evidence is admissible to show that the note has been *actually destroyed*, or that it *cannot* come to the hands of a *bonâ fide* holder. *Rolt v. Watson*, 4 Bing. 273; *Rowley v. Ball*, *supra*. The case where a bank bill is

cut in halves and one of them is lost, and payment sought for the other, would seem to stand upon the same grounds as that of a lost negotiable instrument. *Mayor v. Johnson*, 3 Camp. 324. But see *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. 172; *Patton v. State Bank*, 2 Nott & McCord. 464; *Hinsdale v. Bank of Orange*, 6 Wend. 378.

(r) *Pierson v. Hutchinson*, 2 Campb. 211; Lord *Eldon*, in *Ex parte Greenway*, 6 Ves. 812.

CHAPTER XVI.

INFANTS.

IN general, all persons may enter into contracts; and when a contract is made the law presumes the competency of the parties. If, therefore, a party rests his action or his defence upon his incompetency, this must be proved. (s) This incompetency may be absolute and entire, or limited and partial; in some cases a contract is void as to both parties, and in others only as to one; in some cases void, and in others voidable. We shall consider these questions as we proceed.

As the essence of a contract is an assent or agreement of the minds of both parties, where such assent is impossible, from the want, immaturity, or incapacity of mind, there can be no perfect contract. On this ground rests, originally, the disability of infants. We will first consider this class of disabled persons.

SECTION I.

INCAPACITY OF INFANTS TO CONTRACT.

All persons are denominated infants, by the common law, until the age of twenty-one. But in some parts of this country females reach majority, at least for some purposes, at eighteen. (t) An infant, using the word in its common

(s) *Jeune v. Ward*, 2 Stark. 326; *Leader v. Barry*, 1 Esp. 353. Not only is a defendant, who sets up his infancy as a defence to his contract, bound in the first instance to prove his non-age affirmatively, but if to such a plea the plaintiff reply a new promise, *after the defendant became of age*, he may show a new promise at any time, (before the suit was commenced,) and the defendant must prove that he was still a minor at the time of such ratification. *Bay v. Gunn*, 1 Denio, 108; *Borthwick v. Caruthers*, 1 T. R. 648; *Hartley v. Wharton*, 11 Ad. & El. 934.— If the infant leave the point in doubt, the defence is not sustained. *Harrison v. Clifton*, 17 Law Jour. Ex. 233.

(t) *Sparhawk v. Buell*, 9 Verm. 42, 79.

meaning, that of a child who has not left its mother's arms, cannot make a contract in fact; but most children who are a few years old are capable of making a contract. And when the law says that they are not capable until the age of twenty-one, it is for their sake, and by way of protection to them. If we keep this principle distinctly in mind it will guide us through the intricacies of the law in relation to this subject.

Thus, as a general rule, the contract of an infant is said to be not void, but voidable. That is, he may, either during his minority, or within a reasonable time after he becomes of age, (*u*) avoid the contract if he will, or when he reaches the age of twenty-one, if he sees it to be for his benefit, and chooses so to do, he may confirm and enforce the contract. It has been said that whatever contract the court can see and declare to be to his prejudice, that will be pronounced void; and whatever contracts are not clearly to his prejudice, but may be useful, these will be held voidable. And in reliance on this principle as a safe and sufficient rule, an infant's warrant of attorney authorizing a conveyance of his land, (*v*) a confession of a judgment against him, (*w*) and his cognovit for the same purpose, although the action was wholly for necessaries. (*x*) or his appointment of an agent of any kind, (*y*) his bond *with a penalty*, or for the payment of interest, (*z*) a release by a female infant to her guardian, (*a*) an infant's contract of suretyship, (*b*) and his release of his legacy or his distributive

(*u*) It was settled by the case of *Zouch v. Parsons*, 3 Burr. 1794, that an infant cannot avoid his conveyances of land until he becomes of age. In *Roof v. Stafford*, 7 Cow. 179, it was held that the same rule applied to a sale of chattels; but in the same case, on error, 9 Cow. 626, the distinction was maintained, that while he could not avoid a conveyance of lands until he was of age, he might a sale of chattels. So also in *Bool v. Mix*, 17 Wend. 119, and in *Shipman v. Horton*, 17 Conn. 481. See also *Matthewson v. Johnson*, 1 Hoffman's Chancery, 560. See *post* on this subject.

(*v*) *Lawrence v. McArter*, 10 Ohio, 37; *Pyle, &c. v. Cravens*, 4 Littell, 17.

(*w*) *Saunderson v. Marr*, 1 H. Bl. 75; *Bennett v. Davis*, 6 Cow. 393; *Waples v. Hastings*, 3 Harring. 403.

(*x*) *Oliver v. Woodroffe*, 4 Mees. & Welsb. 650.

(*y*) *Doe d. Thomas v. Roberts*, 16 Mees. & Welsb. 778.

(*z*) *Baylis v. Dineley*, 3 M. & S. 477; *Hunter v. Agnew*, 1 Fox & Smith, (Irish) 15; *Colcock v. Ferguson*, 3 Des. 482.

(*a*) *Fridge v. The State*, 3 Gill & Johns. 104.

(*b*) *Wheaton v. East*, 5 Yerg. 41, 61; *Allen v. Minor*, 2 Call, 70. But see *contrâ*. *Hinely v. Margaritz*, 3 Barr, 428.

share in an estate (c) have each been declared to be absolutely void. (d)

The better opinion, however, as may be gathered from the later cases, cited in our notes, seems to be that an infant's contracts are none of them absolutely void, that is, so far void that he cannot ratify them after he arrives at the age of legal majority. Such, at least, is the strong tendency of modern decisions. (e)

But the contract of an infant for necessities is neither void nor voidable. It is permitted for his own sake that he may make a valid contract for these things, as otherwise, whatever his need, he might not be able to obtain food, shelter, or raiment. And the principles which govern this rule show plainly that it is intended only for his benefit, and is regarded and treated as an exception to a general rule.

The word necessities, in relation to an infant, is not used in a strict sense; but the social position of the infant, his means, and those of his parents, are taken into consideration. Necessaries for him mean such things as he ought properly to have, and not merely that which is indispensable to his life or his comfort. It is difficult to lay down any positive rule which shall determine what are and what are not necessities. Indeed there is no such rule. It may be said, however, that whether articles of a certain *kind*, or certain *subjects* of expenditure, are or are not such necessities as an

(c) Langford v. Frey, 8 Humphrey, 443.

(d) In Connecticut some contracts of an infant are made *void* by statute. Rogers v. Hurd, 4 Day, 57; Maples v. Wightman, 4 Conn. 376.

(e) The rule that an infant's contracts are void or voidable according as they may be pronounced to be prejudicial or useful, has been laid down, and recognized by many respectable courts and judges. See Keane v. Boycott, 2 H. Bl. R. 515; Baylis v. Dineley, 3 Maule & Selwyn, 477, 481; Latt v. Booth, 3 Carr. & Kir, 292; Vent v. Osgood, 19 Pick. 572; Lawson v. Lovejoy, 8 Greenl. 405; Rogers v. Hurd, 4 Day, 57; McGan v. Marshall, 7 Hump. 121; Fridge v. The State, 3 Gill & Johns. 104; Ridgeley, v. Crandall, 4 Maryl. 435; Wheaton v. East, 5 Yerg. 41;

McMinn v. Richmonds, 6 Id. 9; Kline v. Beebe, 6 Conn. 494; United States v. Bainbridge, 1 Mason, 71, 82, and many other cases. But it may be questioned whether it is a sufficiently clear, certain, and *practical* rule. The more recent authorities incline to hold *all* (or all with a single exception,) an infant's contracts to be *voidable* merely, not void, and that it is the privilege and right of the *infant* only (not that of a court,) to declare his contracts void. And the rule itself, as alluded to in the text, and sustained by the older authorities, has been declared unsatisfactory, liable to many exceptions, and difficult of safe application. See Fonda v. Van Horne, 15 Wend. 631, 635; Breckenbridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 241; Scott v. Buchanan, 2 Humph. 468; Cole v. Pennoyer, 14 Ill. 158;

infant may contract for, is matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question also as to *quantity*, are matters of fact for the jury to determine. (*f*) The cases cited in the notes will show the views taken of this question by various courts in England and in this country. It seems to be certain that food, clothing, lodging, and needful medicine, are such necessities; and the infant may contract for them on credit, though he has ready funds in his possession. (*g*) So, proper instruction. (*h*) Necessaries for an infant's wife may be validly contracted for by him; but not if they be necessities provided in view of marriage, though his wife afterwards use them. (*i*) And it seems that, as an incident to a marriage, which an infant may contract, he is liable during coverture for the anti-nuptial debts of his wife. (*j*) He is also liable to the same extent as an

Cummings v. Powell, 8 Texas, 80; Parke B. in Williams v. Moore, 11 M. & W. 256; 1 Am. Leading Cases, 103, 104. And see note (*l*) p. 275.

(*f*) Bent v. Manning, 10 Verm. 225, 230; Beeler v. Young, 1 Bibb, 519, 521; Grace v. Hale, 2 Humph. 27, 29; Stanton v. Wilson, 3 Day, 37; Phelps v. Worcester, 11 N. H. 51; Harrison v. Fane, 1 Mann. & Grang. 550; Peters v. Fleming, 6 Mees. & Welsb. 42; Burghart v. Angerstein, 6 C. & P. 690; Tupper v. Cadwell, 12 Met. 559. This is to be understood with some limitation however, for the *quantity* of goods supplied may be excessive, in which case, if the jury give the plaintiff his whole bill, their verdict may be set aside. Johnson v. Lines, 6 Watts & Serg. 80. So if they find a verdict for the plaintiff, contrary to the opinion of the court, a new trial will be granted. Harrison v. Fane, 1 Mann. & Grang. 550.

(*g*) Burghart v. Hall, 4 Mees. & Welsb. 727.

(*h*) And for some the term proper instruction might include a knowledge of the learned languages, while for others a mere knowledge of reading and writing may be sufficient. Alderson, B., in Peters v. Fleming, 6 Mees. & Welsb. 48. But a regular collegiate education for one in the ordinary station and circumstances in life, has been held in this country not within the term "necessa-

ries." Middlebury College v. Chandler, 16 Verm. 683. But a good "common school" education would be for every one; such an education is essential to the intelligent discharge of civil, political, and religious duties. Royce, J., in Middlebury College v. Chandler, 16 Verm. 686. Instruction in reading and writing was held necessary, in Manby v. Scott, 1 Siderfin, 112; and the reason given was, for that it was for the benefit of the realm that learning should be advanced. In Raymond v. Loyl, 10 Barb. Sup. Ct. 489, Hand, J., says:—"It was said on the argument that 'schooling' is not a necessary. And Mr. Chitty says, *it seems* a parent is not legally bound to educate his child. Chit. on Cont. 140. A parent is almost the sole judge of what is necessary. But if a parent is liable to a third person, I hope it will never be decided that sending to a common school, at a suitable season, and to a reasonable extent, is not necessary, in this country."

(*i*) Turner v. Trisby, 1 Strange, 168. See Rainsford v. Fenwick, 1 Carter, 215; Abell v. Warren, 4 Verm. 149, 152; Beeler v. Young, 1 Bibb, 519, 520. And an infant widow is personally bound by her contract for the funeral expenses of her deceased husband, who died leaving no assets. Chapple v. Cooper, 13 M. & W. 252.

(*j*) Paris v. Stroud, Barnes's Notes,

adult would be for necessities supplied to his lawful children. (*k*) In some cases, such things as horses, or regimentals, or watches, or even jewellery, are regarded as necessities. (*l*) An infant cannot borrow money, so as to render himself liable to an action for money lent, although borrowed for and expended for necessities; because the law does not, for his own sake, trust him with the expenditure. (*m*)

95; *Roach v. Quick*, 9 Wend. 238; *Butler v. Breek*, 7 Met. 164. But this is to be understood only of such debts as the wife was legally liable to pay at her marriage.

(*k*) *Dicta* in *Abell v. Warren*, 4 Verm. 152; *Beeler v. Young*, 1 Bibb, 520.

(*l*) To be necessities the articles must be *bonâ fide* purchased for use, and not for mere ornament; they need not be such as a person could not do without, but should be in quality and quantity suitable for his real wants, and his condition and circumstances in life. The term includes his food, but not dinners, confectionery, fruit, &c., supplied to his friend. *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. McKenzie*, 5 Q. B. 606. Also lodging and house rent. *Kirton v. Elliott*, 2 Bulst. 69; *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 B. & P. 340; but not repairs upon his house, although beneficial in themselves, and necessary to save the building from decay. *Tupper v. Cadwell*, 12 Met. 559; nor food for his horses. *Mason v. Wright*, 13 Met. 306; nor the rent of a building for carrying on a trade or manual occupation. *Lowe v. Griffiths*, 1 Scott, 458. Suitable clothing also comes within the class of necessities, but not suits of satin and velvet with gold lace. *Makarell v. Bachelor*, Cro. Eliz. 583; nor racing jackets. *Burghart v. Angerstein*, 6 C. & P. 690; nor cockades for an infant captain's soldiers. *Hands v. Slaney*, 8 T. R. 578; although regimentals for a volunteer, and livery for such captain's servant have been held otherwise. *Id.*; *Coates v. Wilson*, 5 Esp. 152. The following are examples of articles not generally "necessaries": Horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles. *Beeler v. Young*, 1 Bibb, 519; *Glover v. Ott*, 1 McCord, 572; *Rainwater v. Durham*, 2 Nott & McCord, 524; *Grace v. Halo*, 2 Humph.

27; *Clowes v. Brooke*, 2 Strange, 1101; *Harrison v. Fane*, 1 Mann. & Grang. 550. A stanhope. *Charters v. Bayntun*, 7 C. & P. 52. Coach hire. *Hedgley v. Holt*, 4 C. & P. 104. A chronometer for a lieutenant in the navy, not then in commission. *Berolles v. Ramsay*, Holt, 77. Balls and serenades. *Carter*, 216. Counsel fees and expenses of a law suit. *Phelps v. Worcester*, 11 New Hamp. 51. But as each case is governed by its own peculiar circumstances, the examples here given can serve only as illustrations, and under different circumstances would not necessarily be binding precedents. Thus, as we have just seen, horses are not generally necessary, but when an infant had been advised to ride on horseback for his health, a different rule was applied. *Hart v. Prater*, 1 Jurist, 623.

(*m*) *Smith v. Gibson*, Peake's Add. Cas. 52; *Darby v. Boucher*, 1 Salk. 279; *Probart v. Knouth*, 2 Esp. 472, note; *Beeler v. Young*, 1 Bibb, 519, 521; *Earle v. Peale*, 1 Salk. 387, 10 Mod. 67; *Walker v. Simpson*, 7 Watts & Serg. 83, 88; *Bent v. Manning*, 10 Verm. 225, 230. It is otherwise in equity. *Marlow v. Pitfield*, 1 P. Wms. 558. But money advanced to an officer, to procure the liberation of an infant from an arrest on a debt for necessities, may be recovered, it not being strictly speaking money lent. *Clarke v. Leslie*, 5 Esp. 28. So an infant is liable for money paid at his request to satisfy a debt which he had contracted for necessities. *Randall v. Sweet*, 1 Denio, 460. So if the infant give his note for the necessities, and another sign as surety, and subsequently pay the note, he may recover the amount of the infant. *Conn v. Coburn*, 7 New Hamp. 368; *Haine v. Tarrant*, 2 Hill, (S. C.) 400.

SECTION II.

OF THE OBLIGATIONS OF PARENTS IN RESPECT TO INFANT CHILDREN.

The obligation of the father to maintain the child is and always has been recognized in some way and in some degree, in all civilized countries. The infant cannot support himself. Others must therefore supply him with the means of subsistence; and the only question is, whether the public (that is, the State,) shall do this, or shall his parent. And justice, equally with the best affections of our nature, answer that it is the duty of the parent. But it is a very difficult question how far this duty is made a legal obligation, by the common law.

In England, after much questioning, and perhaps a tendency to hold the father liable for necessities supplied to the child, on the ground of moral obligation and duty, (n) it

(n) In *Simpson v. Robertson*, 1 Esp. 17, (1793,) which is the earliest case on this point, Lord *Kenyon* said he had ruled before, that if a tradesman colludes with a young man, and furnishes him with clothes to an extravagant degree, *though the father might have been liable had they been to a reasonable extent*, the tradesman who gives credit to such an extravagant degree shall not at law be allowed to recover. *Crantz v. Gill*, 2 Esp. 471, (1796,) decided that if the father gives the son a reasonable allowance for his expenses, he is not liable even for necessities furnished to the son. The presumption of liability was rebutted by the allowance. But this case seems to imply that such liability exists in the absence of rebutting circumstances.—In *Urmston v. Newcomen*, 4 Ad. & El. 899, 6 Nev. & Man. 454, (1836,) it was considered as a doubtful question whether a parent was, at common law, liable to pay a third person, who furnishes necessities to his deserted child. Sir John Campbell, Attorney-General, *arguendo*, says, p. 903; —“Then the question is whether a father, if he desert his legitimate child, be not liable in *assumpsit* to any one

who provides food and clothing for it. There is no express decision on the point.” Alexander, *contra*: —“The supposed foundation of the defendant’s liability does not exist. It is not true that by the common law a father is bound to maintain his child.” Lord Denman, C. J., says: —“The general question is important; but the facts do not raise it.” And afterwards, “The general question, therefore, which we should approach with much anxiety, does not arise.” *Littledale, J.* “The general question does not arise.” *Paterson, J.* “I agree that the general question does not arise.” *Coleridge, J.* “It is best to say nothing on the general question. For the purpose of this case, I will assume (what is not to be understood as my opinion at present,) that the general liability is as contended by the Attorney-General.”—In *Law v. Wilkin*, 6 Ad. & El. 718, (1837,) the defendant’s son was from home at school, and appeared to be in want of clothes, when the plaintiff supplied him. When the boy went home, he took the clothes with him, but did not wear them. There was no evidence that the father ever saw the clothes, or that he

seems to be, on the whole, settled, that this moral obligation is not a legal one ; and indeed it has been recently peremptorily decided that no such legal obligation exists in the case of contracts made by the child for necessaries. (o) The

had any communication with the plaintiff before or after they were furnished. The judge at *nisi prius* nonsuited the plaintiff, thinking there was not sufficient evidence to go to the jury to charge the defendant. The Court of King's Bench set aside the nonsuit, on the ground that there was some evidence to that effect; and Lord Denman, C. J., who with his brethren the year before had carefully and almost anxiously avoided the question, in *Urmston v. Newcomen*, now said :—“ A father is properly liable for any necessary provision made for his infant son.” *Littledale, Patteson, and Coleridge, JJ.*, made no objection to this *dictum*, although the decision of the case did not require it.—In *Cooper v. Phillips*, 4 C. & P. 581, (1831.) *Taunton, J.*, says :—“ If the father of a family lives at a distance from the place at which his children are, and puts them under the protection of servants, I am of opinion that if any accident occurs to one of the children, even from the carelessness of the servant, the father of the family is bound to pay for the medical attendance on such child.”

(o) In *Baker v. Keen*, 2 Starkie, 501, (1819.) *Abbott, C. J.*, said :—“ A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father, who had an imprudent son, might be prejudiced to an indefinite extent ; it was therefore necessary that some proof should be given that the order of a son was made by the authority of his father. The question, therefore, for the consideration of the jury, was, whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at Harlow, and had paid his expenses whilst he remained there. The son, it appeared, then obtained a commission in the army, and, having found his way to London, at a considerable distance from his father's residence, had ordered regimen-

tals and other articles [suitable to his equipment for the East Indies. If it had appeared in evidence that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, the circumstance might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing however of this nature had been proved ; and since the articles themselves were necessary for the son, and suitable to that situation in which the defendant had placed him, it was for the jury to say, whether they were not satisfied that an authority had been given by the defendant.”—This was soon followed by *Fluck v. Tollemache*, 1 C. & P. 5, (1823,) before *Burrough, Justice* of King's Bench. The defendant's son was a cadet at Woolwich, the father living at Uxbridge. Upon being written to to pay the plaintiff's bill, which was the first knowledge the defendant had of the transaction, he said he had ordered no goods of the plaintiff, and would not pay for any supplied to his son. The latter was fifteen years old. *Burrough, J.*, told the jury that “ an action can only be maintained against a person for clothes supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first furnished without his knowledge, and he has adopted the contract afterwards ; such adoption may be inferred from his seeing his son wear the clothes, and not returning them, or making, at or soon after the time when he knows of their being supplied, some objection. Here the only knowledge that it appeared the defendant had of the transaction was being asked for the money ; he then repudiated the contract altogether. It would be rather too much that parents should be compellable to pay for goods that any tradesman may, without their knowledge, improvidently trust their sons with.”—In *Blackburn v. Mackey*, 1 C. & P. 1, (1823,) before *Abbott, Chief Justice* of the King's Bench, the defendant's son was a minor living away from

father's liability is nevertheless admitted in many English cases, but is now put on the ground of *agency*; and the

his father, as a clerk in London, receiving a guinea a week as wages. The father did not supply the son with any clothes, and it was proved that he was, at the time of the supply by the plaintiff, in great want of them. The defendant did not know the plaintiff, and when informed of the supply of clothes to his son, he repudiated the contract altogether. *Abbott, C. J.*, told the jury that a father was not bound to pay for articles ordered by his son, unless he had given some authority, express or implied.—In *Rolfe v. Abbott*, 6 C. & P. 286, (1833,) the defendant's son, a young man of nineteen years of age, and having a situation worth £90 a year, went with a friend who introduced him to the plaintiff, a tailor, and the latter supplied him with clothes, and soon after sent his bill, debiting them to the son and not to the father. The friend of the minor had no authority from the father to introduce his son to the plaintiff, and there was no evidence that the father knew of the transaction. In summing up to the jury, *Gurney, B.*, said:—"The question in this case is, whether these clothes were supplied to the son of the defendant by the assent of the defendant. For, to charge him, it is essential that the goods should have been supplied with his assent or by his authority. Indeed, if the law were not so, any one of you who had an imprudent son might have bills to a large amount at the tailor's, the hatter's, the shoemaker's, and the hosier's, and you know nothing at all about it."—*Clements v. Williams*, 8 C. & P. 58, (1837,) was an action by a schoolmaster against a guardian for clothes supplied his ward, who had been placed in the plaintiff's school, but who had not been provided by his guardian with clothes for upwards of a year. The schoolmaster supplied his wants, and charged them to the guardian, with his bill for tuition. *Williams, J.*, told the jury that he was not aware of any authority which a schoolmaster had to cause his pupil to be supplied with articles of wearing apparel without the sanction, express or implied, of the parent or guardian; and that it was the duty of the schoolmaster, if he observed his pupil to be in want of such articles, to communicate that fact to the boy's

friends, and not to furnish him with such things without their authority.—*Seaborne v. Maddy*, 9 C. & P. 497, (1840,) is also a very strong case against the parent's liability. This was an action of assumpsit for the board and lodging of the defendant's illegitimate child. The child had been placed with the plaintiff by the defendant in the year 1831, at 2s. a week, and the amount had been paid down to the month of April, 1838. The child remained with the plaintiff down to April, 1839, and evidence was given of a conversation in the month of May following, in which it was alleged that the defendant had promised payment of the amount claimed. The defendant gave evidence that at the time of settlement in 1838 he said the plaintiff was to give up the child either to Mr. Parkes or the Union, for he would pay no longer. Evidence was also given, that on several occasions when asked for payment the defendant refused to pay any thing, and there was also contradictory evidence as to the conversation in May, 1839. *Parke, Baron*, said:—"No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. In the present case there had been a contract in 1831, which was put an end to in 1838. However, on the part of the plaintiff, it is contended that a new contract is to be inferred from the conversation with the defendant in the year 1839. This is for you to consider. But you must also bear in mind that the defendant has on several occasions distinctly refused to pay any thing, and that as to one of the conversations the evidence is contradictory."—The case of *Mortimore v. Wright*, 6 M. & W. 482, (1840,) seems to be decisive on this point. *Lord Abinger, C. B.*, said:—"I am clearly of opinion that there was no evidence for the jury in this case, and that the plaintiff ought to have been nonsuited. The learned judge was anxious, as judges have always been in modern times, not to withdraw any scintilla of evidence

authority of the infant to bind the father by contracts for necessities is inferred, both in England and in this country, from very slight evidence. (p) If we take the case of neces-

from the jury; but he now agrees with the rest of the court that there ought to have been a nonsuit. In the present instance I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. . . . With regard to the case in the Court of King's Bench of *Law v. Wilkin*, if the decision is to be taken as it is reported, I can only say that I am sorry for it, and cannot assent to it. It may have been influenced by facts which do not appear in the report; but, as the case stands, it appears to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative; which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father, in point of law, for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices." *Parke, B.*, added, "It is a clear principle of law that a father is not under any legal obligation to pay his son's debts."—And

in *Shelton v. Springett*, 20 E. L. & E. 281, the same principles are reiterated; and the law declared to be well settled that without some contract express or implied the father is not liable for necessities supplied to the son. *Jervis, C. J.*, says, "If a father turns his son upon the world the son's only resource in the absence of any thing to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty."

(p) This may be inferred from some of the cases we have already cited; but it was doubted in *Mortimore v. Wright*, whether *Law v. Wilkin*, and *Blackburn v. Mackey* were law. And in *Shelton v. Springett* where the father had given his son 5*l.* and sent him to London to look out for a ship, telling him to put up at a particular hotel, but the son put up at another, upon which evidence the jury had found a verdict against the father for the son's board, the verdict was set aside and a nonsuit ordered on the ground that there was no evidence to warrant a jury in holding the father liable. In *Forsyth v. Milne*, (1808,) cited in *Macpherson on Infants*, p. 511, the defendant's wife, in his absence and without his knowledge, contracted with a third person for the board of their minor daughter. The defendant paid the bill, but expressed some disapprobation of it. The mother removed the daughter to another situation; it was held that the first payment so far acknowledged the discretionary power of the wife to contract, as to make the father liable to the plaintiff upon the second contract.—In *Bryan v. Jackson*, 4 Conn. 288, (1822,) where the defendant's minor son had taken up goods of the plaintiff, which the defendant paid for, without objection, or giving notice not to trust his son any further, and the son afterwards took up other goods of a similar nature; it was held that the payment so made by the defendant was equivalent to a recognition of his son's authority, and rendered the defendant liable for the goods subsequently taken up, although he had (but without the plaintiff's knowledge,) given positive or-

saries supplied to an infant actually incapacitated by want of age, or by disease of mind or body, from making any contract, or acting in any way as the agent of any person, the father cannot be made liable excepting on the ground of his parental obligation; and there are cases, or rather dicta in some cases which might indicate, perhaps, that the question would be decided in England in favor of this liability on his part, if it were necessary. It will be noticed, that where it is most distinctly denied that this moral obligation of the parent constitutes a legal obligation, the denial is confined to a liability for the contracts of the child. The reason is said to be, the danger of permitting a father to be bound in this way, and it is variously illustrated in the cases; but this reason fails where the infant can make no contracts, and must be supplied or suffer.

In this country, the rule of law varies in the different States. In most of them in which the question has come before the courts, the legal liability of the parent for necessaries fur-

ders to his son to contract no more debts, and had placed him under the care of a friend, with instructions to furnish him with every thing necessary and suitable for him. See also *McKenzie v. Stevens*, 19 Ala. 691.—It was held in *Nichole v. Allen*, 3 C. & P. 36. (1827,) that if a parent knew that a third person was maintaining his minor child, although illegitimate, and expressed no dissent, he is liable, unless he show that the child is there against his consent; but this case was afterwards denied in *Mortimore v. Wright*.—In *Rumney v. Keyes*, 7 New Hamp. 571, (1835,) it was held, that if a husband, living in a state of separation from his wife, suffers his children to reside with the mother, he is liable for necessaries furnished them, and she is considered as his agent to contract for this purpose. And see *Rawlins v. Vandyke*, 3 Esp. 250, (1800.) In *Deane v. Annis*, 14 Maine, 26, (1836,) the defendant's minor son left his father's home against his will, and refused to return to it upon his father's commands. Being afterwards taken sick, however, he did return, and remained until his death. During his sickness his father went with him to the plaintiff's house to obtain medical advice, and the plaintiff afterwards visited

the boy professionally at his father's house. No express promise was proved to pay the plaintiff, nor did the father notify him that he did not expect to pay him. The father was held liable for the plaintiff's services.—The case of *Thayer v. White*, 12 Met. 343, (1847,) has an important bearing upon the point of implied liability. It does not appear in that case that the defendant's son was a minor, nor were the goods bought by the son necessaries, but the facts were that a son, who had several times, with his father's express consent, bought goods of T. in the name and on the credit of his father, again bought goods of T. in the name of his father, on six months' credit: T. charged the goods to the father, and immediately wrote a letter to him, informing him thereof, and stating that he supposed it was correct, but thought proper to give him notice. The father made no reply to this letter. *Held*, in a suit by T. against the father, for the price of the goods, that the jury were warranted in inferring, from the father's silence, his consent to the transaction thus notified to him. *Held* also, that such consent was proof either of an original authority to the son, or of a subsequent affirmance by the father, which bound him to pay for the goods.

nished to the infant, is asserted, unless they are supplied by the father; and it is put on the ground that the moral obligation is also a legal one, and some of our courts have declared this quite strongly. (q) In other States the present *English rule has been declared to be law, and agency and authority are held to be the only ground of such liability. (r)

(q) See *Stanton v. Wilson*, 3 Day, 37, (1808.) In this case the father had been divorced from the plaintiff, his former wife, and two of their children were ordered into her custody as guardian. A third remained with his father (the defendant,) for a few years, when through fear of personal violence and abuse from his father he fled, and went to live with his mother and her second husband, who furnished him with support and education. The action was brought to recover for the support of the three children. "It was agreed that the whole of the charges accrued without any request from the father, and that he never made any express promise to pay them." The court (two judges dissenting,) held the father liable for the whole bill, saying:—"Parents are bound by law to maintain, protect, and educate their legitimate children during their infancy. This duty rests on the father. But because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education, and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The infant cast on the world must seek protection and safety where it can be found; and where with more propriety can it apply than to the next friend, nearest relative, and such as are most interested in its safety and happiness? The father having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say it was furnished without his consent, or against his will." But see *Finch v. Finch*, 22 Conn. 411, *post* note (u). In the case of *Edwards v. Davis*, 16 Johns. 284, it was decided that there was no common-law obligation requiring a child to support a parent; but *Spencer, J.*, in delivering the opinion of the court, said:—"The duty of a parent to maintain his offspring, until they attain the age of maturity, is

a perfect common-law duty." In the matter of *Ryder*, 11 Paige, 187, *Walworth, Ch.*, says:—"A parent who has the means is undoubtedly bound to support his or her minor child." See also *Benson v. Remington*, 2 Mass. 113; *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Pidgin v. Cram*, 8 New Hamp. 353; 2 Kent's Com. 193; *Call v. Ward*, 4 Watts & Serg. 118.

(r) In *Hunt v. Thompson*, 3 Scam. 180, (1841,) *Wilson, C. J.*, said:—"That a parent is under an obligation to provide for the maintenance of his infant children, is a principle of natural law; and it is upon this natural obligation alone that the duty of a parent to provide his infant children with the necessaries of life rests; for there is no rule of municipal law enforcing this duty. The claim of the wife upon the husband, for necessaries suitable to his rank and fortune, is recognized by the principles of the common law, and by statute. A like claim to some extent may be enforced in favor of indigent and infirm parents, and other relatives, against children, &c., in many cases; but, as a general rule, the obligation of a parent to provide for his offspring is left to the natural and inextinguishable affection which Providence has implanted in the breast of every parent. This natural obligation, however, is not only a sufficient consideration for an express promise by a father to pay for necessaries furnished his child, but when taken in connection with various circumstances has been held to be sufficient to raise an implied promise to that effect. But, either an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessaries furnished his infant child by a third person."—*Owen v. White*, 5 Porter, 435, (1837,) seems to deny the legal obligation of the father, except on a contract, express or implied; but ad-

The law can hardly be considered as positively settled either in England or in this country. But we would state, as strongly prevailing rules here, that where goods are supplied to an infant which are not necessities, the father's authority must be proved to make him liable; where they are necessities the father's authority is presumed unless he supplies them himself, or was ready to supply them; where the infant lives with the father, or under his control, his judgment as to what are necessities will be so far respected, that he will be held liable only for things furnished to the infant to relieve him from absolute want; where the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps, in cases of absolute necessity; and where he has been deserted by the

mits that such contract is implied where the father fails in his duty to support the child, or drives him from home. Then the father is "liable for a suitable maintenance." In *Varney v. Young*, 11 Verm. 258, (1839,) the court appear to deny altogether that the moral obligation of the father constitutes any legal obligation. *Bennett, J.*, says:—"There must be proof of a contract, *express* or *implied*, a *prior* authority, or a *subsequent* recognition of the claim."—Perhaps the strongest case in the American reports, against the liability of the father, is *Gordon v. Potter*, 17 Verm. 350, (1845.) There the defendant told his minor son in the spring to go out to work, and in the fall he would get him some winter clothes. The son went to service at monthly wages. In June following, the plaintiff furnished him with *cloth* and *trimmings* for a suit of clothes. The father knew of this purchase by the son, and *furnished him money to pay for making them up*; he also permitted him to wear out the clothes. It did not clearly appear whether the plaintiff furnished the goods upon the son's or the father's credit. And this might have been a sufficient ground for the decision itself; but *Redfield, J.*, went much further, and said:—"But there is one defect in the case, which we think must clearly and indisputably preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly or by impli-

cation, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessities for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seems to justify the conclusion that the parent may be made liable for necessities for his child, even against his own will. But an examination of all the cases upon this subject will not justify any such conclusion." After critically examining the American and English authorities, he concluded:—"It is obvious that the law makes no provision for strangers to furnish children with necessities, against the will of parents, even in extreme cases. For if it can be done in extreme cases it can be done in every case where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessities, suitable to the varying taste of the times. There is no stopping-place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by the statute, compel a proper maintenance. But this, according to the English common law, which prevails in this State, is not the right of every intermeddling stranger."

father, or driven away from him, either by command or by cruel treatment, there the infant carries with him the credit and authority of the father for necessaries. And wherever the question is how far the father is liable for necessaries supplied to the child, this word "necessaries" will not generally be understood in the very liberal sense given to it when the question is as to the capacity of the infant to contract, but will be interpreted according to the circumstances of the case. And if the child be of sufficient age and strength to earn by proper exertions the whole or a part of his subsistence, it will not be deemed "necessary" that the aid should be rendered to him which it would be "necessary" to give to an infant incapacitated by tender years, or by debility of mind or body, from contributing to his own support.

So far as the duty of support certainly belongs to the parent as a legal obligation, and is neglected, any other person may perform it, and will be regarded as performing it for him; and, on general principles, the law will raise a promise on the part of the parents, to compensate the party who thus did for him what he was bound by law to do. (s) But this rule is carried no farther than its reason extends; and is guarded by many restrictions from becoming the means of injury to the parent. Thus, we have seen that if the child be living with the parent, or, as it is said in some cases, if he be *sub potestate parentis*, the law will not presume that the parent neglects the child, but will presume a due care of him, until the contrary is shown; and of the propriety and sufficiency of the clothing, &c., the parents must judge; and if a stranger under such circumstances supplies the child even with necessaries he certainly cannot hold the parent upon the contract implied by his duty, without proving a clear and unquestionable abandonment and neglect of that duty. But if the supplier seeks to make the parent responsible, on the ground that his authority was given to the child, then, if the

(s) In the matter of Ryder, 11 Paige, 188, *Walworth*, Ch. says:—"A stranger may furnish necessaries for the child, and recover of the parent compensation therefor, where there is a clear and palpable omission of duty, on the

part of the parent, in supplying the child with necessaries." Equally strong are *Van Valkinburg v. Watson*, 13 Johns. 480, and *Pidgin v. Cram*, 8 New Ham. 350.

goods supplied were necessities, it would seem from the cases, as we have said, that slight evidence is sufficient to prove such authority; as that the father saw the son wear the clothes, or knew that he had received them, and made no objection. But if the things supplied are strict and absolute necessities, needful for the child's subsistence, or if the child is living away from the parent, under circumstances which indicate a desertion by the parent, or that the child has been expelled from his house, or caused to leave it by the wrongful acts of the parents, then the authorities and dicta to which * we have referred lead to the conclusion that whoever supplies the wants of the child may recover from the parent. (t) But it has been held in England that a father was under no legal obligation to educate his child, and could not be made liable for the expenses of his instruction, where the wife, being cruelly treated at the husband's house, left it, taking the children with her. Precisely this question has not occurred in this country, but the weight and tendency of authorities would not require us to believe that the decision would be the same here as in England. If the wife be divorced, with alimony, and the care of the children be given to her, the father has been held liable not only to her for the expenses she incurs in their support and education, but also to a stranger whom she marries, and who continues to support the children. (u) And where the father and mother separate, and

(t) We are unable to discriminate these cases, on principle, from any which may occur, in which compensation is sought of a father for things supplied to an infant, which were absolutely needed for his subsistence, and which the child would not have had unless they were supplied by a stranger. Where the infant has unnecessarily and in his own wrong left his parent, and renounced the filial relation, it seems to be held that the liability of the parent ceases. But in the principal case in which this is directly decided, (*Angel v. McLellan*, 16 Mass. 28,) the child had absconded to avoid arrest for felony; and although the case finds that "he was in distress in a foreign country," it does not appear that he might not have supported himself by labor, or, in other words, that the things supplied were strict and absolute necessities.

We have some doubts, therefore, whether even this exception would always be allowed. Indeed, we are disposed to regard the rule of law, in this country, generally, if not universally, as imposing a liability on the father for all supplies to an infant, which were so absolutely needed that he must have them or perish. The liability might be put on different grounds in different courts,—in some on the ground of contract and of implied authority, and in others on the legal obligation growing out of the moral obligation,—but on some ground or other we think it would generally be enforced.

(u) *Stanton v. Willson*, 3 Day, 37. But this case was commented upon and denied in *Finch v. Finch*, 22 Conn. 411, and it was decided by a majority of the court that a divorced wife could not maintain an action against her former

the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and is bound by her contract for necessaries for them. (*v*) There is, indeed, authority for holding that if a parent of sufficient ability to provide suitably for his children neglect to do so, he is guilty of an indictable offence. (*w*)

It becomes a different question when the child has an independent property sufficient for his own maintenance; what then is the father's obligation? It would seem that the rule * of law was formerly, that if the parent had abundant means himself, he was bound to provide for his children, even if they had independent property. (*x*) And this rule is enforced even now in some instances. (*y*) It is however, in general, relaxed; and courts go far in appropriating the means of the child to his own support, although the father may also be entirely able to maintain him. (*z*) And where the father is without means to educate and support his children in a manner which is rendered suitable by their position and expectations, courts of equity will not only make an allowance out of the estate of the children, but will, if necessary, take from the principal of a vested legacy for the proper maintenance and education of the legatee. (*a*) Such decrees are usually made for the future maintenance of the child; but it cannot be said that there is a positive rule preventing retrospective allowances. (*b*)

Whether the mother is under an equal obligation with the father to maintain the child, the father being dead, seems not to be quite certain; but the weight of authority, both in England and in this country, might perhaps justify the conclusion that she is not under a legal obligation, (*c*) or that it

husband to recover for the support of their infant children, the custody of whom was awarded to her. Two of the five judges, however, adhered to the decision of *Stanton v. Willson*.

(*v*) *Rawlyns v. Vandyke*, 3 Esp. 251.

(*w*) *Rex v. Friend*, Russ. & Ry. C. C. 20.

(*x*) *Dawes v. Howard*, 4 Mass. 97.

(*y*) In the matter of *Kane*, 2 Barb. Ch. R. 375.

(*z*) *Jervoise v. Silk*, Cooper, Eq. Rep.

52; *Maberly v. Turton*, 14 Ves. 499; *Simon v. Barber*, 1 Tamlyn, 22.

(*a*) *Newport v. Cook*, 2 Ashmead, 332; *Ex parte Green*, 1 Jac. & Walk. 253. See also *Carter v. Rollard*, 11 Humph. 339.

(*b*) In the matter of *Kane*, 2 Barb. Ch. R. 375.

(*c*) The chancery cases which assert this obligation, appear to do so on the ground of the ability of the mother and the need of the children. See *Hughes v. Hughes*, 1 Bro. Ch. 387.

is very greatly qualified in important particulars. Thus, if the child has property, the mother is not bound for the child's maintenance where the father would be. (*d*) And a court of * equity has refused to compel a mother to furnish the means of educating a child, even where she was entirely able to do so; and it is even said that the court have no power to do this. (*e*) A husband is not responsible for the child of his wife by a former husband, unless he takes him into his house; but if he does he assumes, perhaps, the responsibility for his maintenance, so long as he retains him as one of his family. (*f*) But, on the other hand, the relation which he in this case sustains to the child rebuts any presumption which might otherwise exist, of a promise or obligation to pay the child for his services, (*g*) as in the case of his own children. (*gg*)

Where the parent is thus obliged to provide for the child a home, and a sufficient maintenance, so, on the other hand, he has a right to the custody of the child during his minority, and is entitled to all his earnings. (*h*) For these two things, this obligation and this right, go together. Thus, if the father separates from the mother, and permits the child to leave him and go with her, he is no longer entitled to the earnings of the child, and has no power to avoid his reasonable contracts; (*i*) and therefore the son may in such case

In *Benson v. Remington*, 2 Mass. 113, the court say:—"The law is very well settled that *parents* are under obligations to support their children, and that they are entitled to their earnings." In *Nightingale v. Withington*, 15 Mass. 274, *Parker, C. J.*, says:—"Generally the father, and in case of his death the mother, is entitled to the earnings of their minor children. This right must be founded upon the obligation of the parents to nurture and support their children." But it is only a *dictum* in either case; and in neither do the court refer to any authority whatever for this rule; nor are we aware of any direct adjudication, in which it is determined as the point of the case, that the mother and the father stand on the same footing in this respect. See, against the mother's obligation, *Tilton v. Russell*, 11 Ala. 497; *Raymond v. Loyl*, 10

Barb. Sup. Ct. 483; *Pray v. Gorham*, 31 Maine, 241; *Commonwealth v. Murray*, 4 Binn. 487.

(*d*) In *Dawes v. Howard*, 4 Mass. 97, it is said that where minor children have property of their own, the father is, notwithstanding, bound to support them, if of ability; but it is otherwise with the mother.

(*e*) In the matter of *Ryder*, 11 Paige, 185.

(*f*) *Stone v. Carr*, 3 Esp. 1; *Cooper v. Martin*, 4 East, 82; *Tubb v. Harrison*, 4 Term R. 118; *Freto v. Brown*, 4 Mass. 635; *Minden v. Cox*, 7 Cow. 235.

(*g*) *Williams v. Hutchinson*, 5 Barb. Sup. Ct. 122, 3 Comst. 312.

(*gg*) See *post*, Book III., Chap. IX., Sect. I.

(*h*) See note *c*, *supra*.

(*i*) *Wodell v. Coggeshall*, 2 Met. 89; *Chilson v. Philips*, 1 Verm. 41.

make a special contract with his employer, which is valid against the father's will. And if the parent be himself an insane person and a pauper, and therefore under no obligation to maintain the child, he is not entitled to the child's earnings, nor is the town which supports the parent entitled to receive the child's wages, so long as the child himself is not a pauper. (ii) And it has been said that wherever the son is not living with the father, the son may of necessity be entitled to receive the wages of his labor, and that the father's consent to the son's receipt and appropriation of them would be inferred in such case from very slight circumstances. (j)

It is certain that a father may, by an agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and will then have no right to demand those wages, either from the employer or from the child. (k) And such an agreement may be inferred *from circumstances; as where a father left his child to manage his own affairs, and make and execute his own contracts for a considerable time. (l) Or even if the father knew that the son had made such a contract for himself, and interposed no objection. (m) And it has been held that an infant whose father is dead, and whose mother has married again, is entitled to his own earnings. (n)

It is very common in this country to see in the newspapers an advertisement signed by a father, stating that he has given to his minor son "his time," and that he will make no future claim on his services or for his wages, and will pay no debts of his contracting. Such a notice would undoubtedly have its full force in reference to any party to whom a knowledge of it was brought home. And if a stranger, not knowing this arrangement, should employ the son, he might still

(ii) *Jenness v. Emerson*, 15 N. H. 486.

(j) *Gale v. Parrott*, 1 New Hamp. 28.

(k) *Jenney v. Alden*, 12 Mass. 375; *Morse v. Welton*, 6 Conn. 547; *Whiting v. Earle*, 3 Pick. 201; *Varney v. Young*, 11 Verm. 258; *Burlingame v. Burlingame*, 7 Cow. 92. In *Tillotson v. McCrillis*, 11 Verm. 477, it is held that a father may give to his minor son

a part as well as the whole of his time.

(l) *Canovar v. Cooper*, 3 Barb. Sup. Ct. 115; *Clinton v. York*, 26 Maine, 167; *Stiles v. Granville*, 6 Cush. 458; *Wodell v. Coggeshall*, 2 Metc. 91; *Cloud v. Hamilton*, 11 Humph. 104.

(m) *Whiting v. Earle*, 3 Pick. 201; *Armstrong v. McDonald*, 10 Barb. 300;

(n) *Freto v. Brown*, 4 Mass. 675.

interpose it as a defence if the father claimed the son's wages. But if a stranger supplied a son, at a distance from his home, with suitable necessities, in ignorance of such arrangement, there is no sufficient reason for holding that it would bar his claim against the father. And we think that he might recover from the father for *strict* necessities, even if he knew this arrangement. On what ground could the father discharge himself from his liability by such a contract? Even if the father had paid the son a consideration for the release of all further obligation, it would be a contract with an infant, and void or voidable, because certainly not for necessities. And the whole policy and reason of the law of infancy would seem to be opposed to permitting a father to cast his son in this way upon the public, and relieve himself from the obligation of maintenance.

It may be added, that while an infant remains under the care and control of his father, and is in fact supported by him, the infant is not liable, even on his express contract, to a stranger for necessities furnished for him. One reason given for this, is, that it would interfere with his father's right of judging how he should be supported. (*o*) Where services are rendered at the parent's request, it will be presumed that credit is given to him alone, and in that case the infant cannot be liable even for necessities. (*p*)

The common-law liability of a parent to support his child ceases altogether when the infant becomes of full age; and then a parent would not be bound even by his express promise to pay for necessities previously furnished to the child, *not* at the request of the father. (*q*) If they were furnished at his request it would be otherwise. (*r*)

By statute of 43 Eliz. c. 2, the father, "being of ability," is liable to contribute to his child's support even after he becomes of age. And in some of our States similar provision

(*o*) *Angel v. McLellan*, 16 Mass. 28; *Wailing v. Toll*, 9 Johns. 141; *Hull v. Connolly*, 3 McCord, 6; *Kline v. L'Amoureux*, 2 Paige, 419; *Guthrie v. Murphy*, 4 Watts, 80; *Simms v. Norris*, 5 Ala. 42; *Johnson v. Lines*, 6 W. & S. 80; *Phelps v. Worcester*, 11 New Hamp. 51.

(*p*) *Duncomb v. Tickridge*, Aleyn, 94; *Phelps v. Worcester*, 11 New Hamp. 51; *Simms v. Norris*, 5 Ala. 42.

(*q*) *Mills v. Wyman*, 3 Pick. 207. See also *Cook v. Bradley*, 7 Conn. 57.

(*r*) *Loomis v. Newhall*, 15 Pick. 159.

is made. (s) But such a liability is wholly statutory, and does not accrue until proceedings are had pursuant to the statute. (t) So at common law a son is not liable for the support of an infirm and indigent parent. (u) Nor is a father liable at common law for the support of his illegitimate child. The only remedy is under the statute, procuring an order of filiation, and the like. (v)

SECTION III.

VOIDABLE CONTRACTS FOR NECESSARIES.

As an infant is not permitted to enter into general contracts, because his immature judgment would expose him to *injury, and as he is nevertheless permitted to contract for necessities, because otherwise he might suffer for the want of them, so this exceptional permission is qualified in an important particular, for the same purpose of protecting him from wrong. He cannot contract to pay even for necessities, in such wise as to bar an inquiry into the price and value. The law permits persons to supply his necessities, and have therefor a valid claim against him for their fair worth; but it does not permit them to make a bargain with him as to the price, which shall bind him absolutely, because it does not permit him to determine this price for himself, by reason of his presumed inability to take proper care of his own interests; but the value and the price may be determined by a jury. And a seal to the instrument would give it no additional force in this respect, but the infant would

(s) The provision in the Rev. Stat. of Massachusetts, ch. 46, sect. 5, is very broad. "The kindred of any such poor person, if any he shall have, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living within this State, and of sufficient ability, shall be bound to support such pauper, in proportion to their respective ability."

(t) *Loomis v. Newhall*, 15 Pick. 159;

Mortimore v. Wright, 6 M. & W. 488; *Gordon v. Potter*, 17 Verm. 348; *Shelton v. Springett*, 20 E. L. & E. 281.

(u) *Edwards v. Davis*, 16 Johns. 281; *Rex v. Munden*, 1 Str. 190. But see *Gilbert v. Lynes*, 2 Root, 168; *Ex parte Hunt*, 5 Cow. 284.

(v) *Furillio v. Crowther*, 7 Dow. & Ryl. 612; *Cameron v. Baker*, 1 Car. & P. 268; *Moncrief v. Ely*, 19 Wend. 405.

still be bound only for a fair value. For the same reason an infant cannot be bound for the amount in an account stated; (*w*) nor for the sum mentioned in his note, although given for necessities, but only for the value of the necessities; (*x*) nor for the amount due on his bond; for the ancient distinction which held him on a bond without a penalty, but not on a bond with penalty, would probably be now disregarded. (*y*)

*Neither can an infant enter into contracts of business and trade; for this is not necessary, and might expose him to the misfortune of entering upon adult life with the burden of bankruptcy resting upon him. (*z*) But if he uses, as necessities for himself or his family the goods furnished to him for purposes of trade, he is so far liable. (*a*) This liability to pay even for necessities seems to be founded only on his

(*w*) *Ingledeu v. Douglas*, 2 Starkie, 36; *Trueman v. Hurst*, 1 T. R. 40; *Hedgley v. Holt*, 4 C. & P. 104; *Oliver v. Woodroffe*, 4 M. & W. 650; *Williams v. Moor*, 11 M. & W. 256; *Beeler v. Young*, 1 Bibb, 519.

(*x*) *McCrillis v. How*, 3 New Hamp. 348; *Bouchell v. Clary*, 3 Brevard, 194; *Swasey v. Vanderheyden*, 10 Johns. 33; *Fenton v. White*, 1 Southard, 100; *McMinn v. Richmonds*, 6 Yerg. 9; *Hanks v. Deal*, 3 McCord, 257. Some of these cases declare an infant's note, though given for necessities, void, but it is conceived they mean voidable only, and not that such note is not susceptible of ratification. Although an infant's note given for necessities would not bind him as to the amount, he may yet be sued on the instrument, and the plaintiff may recover the just value of the necessities for which the note was given. *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221. See also *Stone v. Dennison*, 13 Pick. 1, that wherever the form of an infant's contract for necessities is such that the consideration is open to inquiry, he may be sued upon the contract itself. And in *Bradley v. Pratt*, 23 Verm. 378, interest is allowed on a promissory note given by an infant, and it is declared that there is no general rule exempting infants from a liability to pay interest on their just debts.

(*y*) The older cases hold that an in-

fant's bond, at least, if given with a penalty, is absolutely void, not voidable merely, although given for necessities. *Ayliff v. Archdale*, Cro. Eliz. 920; *Fisher v. Mowbray*, 8 East, 300; *Baylis v. Dineley*, 3 M. & S. 477; *Hunter v. Agnew*, 1 Fox & Smith, (Irish) 15; *Allen v. Minor*, 2 Call, 70; *Colcock v. Ferguson*, 3 Des. 482.—It is conceived, however, that in this country, bonds, like other contracts, are only voidable, and may be ratified. *Conroe v. Birdsall*, 1 Johns. Cas. 127. The marginal note to this case erroneously uses the word void, in relation to such bond; the court said it was only voidable.

(*z*) *Whittingham v. Hill*, Cro. Jac. 494; *Whywall v. Champion*, 2 Strange, 1083; *Dilk v. Keighley*, 2 Esp. 480. *Latt v. Booth*, 3 Carr. & Kir. 292. But if with his guardian's consent he is carrying on a certain business, it has been held that he might bind himself to pay for articles suitable and necessary for that business, *Rundell v. Keeler*, 7 Watts, 237. *Sed quare*. Although an infant cannot trade, and would not be bound to execute any contract of trade he may have entered into, yet if he has in part executed such contract himself, he may sue the adult for non-performance on his part, and this while he is yet an infant. *Warwick v. Bruce*, 2 M. & S. 205.

(*a*) *Turberville v. Whitehouse*, 1 C. & P. 94, 12 Price, 692.

actual necessities, and if he had already supplied himself with sufficient clothing, it was held that he was not bound to pay for similar articles subsequently purchased, although they might be suitable in themselves, and although he had avoided payment for the first purchase on the ground of his infancy. (b) As he cannot trade, neither can he subject himself to the incidents of trade, as bankruptcy or insolvency, (c) nor is he liable as a partner of a mercantile firm. (d) Nor * can he be sued on his covenant as an apprentice. (e) Nor

(b) *Burghart v. Angerstein*, 6 C. & P. 690.

(c) For no man can be a bankrupt, for debts which he is not obliged to pay. *Rex v. Cole*, 1 Ld. Raym. 443, per *Holt*, C. J.; *Ex parte Sydebotham*, 1 Atk. 146.—And a commission of bankruptcy against an infant is void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365; *O'Brien v. Currie*, 3 C. & P. 283. This is the English rule; but in this country it has been held that an infant is entitled to the benefit of the bankrupt law of the United States of 1841, and that the proceedings might be in his own name. *In re Samuel Book*, 3 McLean, 317.

(d) If, however, an infant engages in a partnership, he must, at or within a reasonable time after the period of his coming of age, notify his disaffirmance thereof; otherwise he will be deemed to have confirmed it, and will be bound by subsequent contracts made on the credit of the partnership. *Goode v. Harrison*, 5 B. & Ald. 147. *Bayley, J.*, in this case, said:—"It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still, he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; if he dissolve the partnership, and if, when of age, he takes the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner. But the foundation of my opinion is the negligence of Bennon at the time he became of age. Suppose an infant is not really a partner, and that, during his infancy, he never in fact enters into any joint purchase, but that he holds out to

different people, 'I am a partner with A. B.,' and then comes of age. Suppose also that the person to whom he made the representation furnishes A. B. with goods, A. B. representing himself to be a partner with the infant, and the latter having done nothing to correct the mistake and apprehension in the mind of the seller of those goods; I should think, in such a case as that, the infant, the person who, when he was an infant, had represented himself as being a partner with A. B., would, by suffering that delusion to continue when he became of age, and neglecting to set the matter right, be liable to all those persons upon whom the delusion operated. That is the justice, and, as it seems to me, the law of the case." So in *Miller v. Sims*, 2 Hill, So. Car. R. 479, it was held that an infant partner, who afterwards confirmed the contract of partnership, by transacting the business and receiving the profits, became thereby liable on all the previous liabilities of the firm, even such as were not known to him. But as to the last point see *contrâ*, *Crabtree v. May*, 1 B. Monroe, 289.

(e) It is clear that an infant cannot be sued on his covenants of indenture. See *Gylbert v. Fletcher*, Cro. Car. 179; *Jennings v. Pitman*, Hutton, 63; *Lylly's case*, 7 Mod. 15; *Whitley v. Loftus*, 8 Mod. 190; *Frazier v. Rowan*, 2 Brev. 47; *McKnight v. Hogg*, 3 Brev. 44.—But if the infant is a party to the indenture, or his consent be expressed in it, many cases have held that the contract of apprenticeship is binding absolutely upon him, and that he cannot dissolve the relation thus created. See *Rex v. Great Wigston*, 3 B. & C. 484.—And a right of action necessarily results to the injured party for a breach thereof. *Woodruff v. Logan*, 1 Eng. Rep. (Ark.)

is his contract for labor and service generally binding. (*f*) But enlistments in the navy, though made without the consent of the parent or guardian, are binding, and the infant cannot avoid them; (*g*) it is otherwise as to the army. (*gg*) Neither can he avoid a contract whereby he undertakes to do what he is under a legal obligation to do; as a bond executed under a statute, to indemnify a town for the support of an illegitimate child; for which *an order of filiation has been made upon him. (*h*) He is not responsible as an innkeeper for losses sustained by his guests. (*i*) Nor will joining her husband in a conveyance bar an infant *feme covert* of her right of dower. (*ii*)

276.—And this, because it was said that such contracts *must be* for the infant's benefit, and therefore he should not avoid them. But analogy and principle would seem to require that, independently of any statutory provisions regulating this matter, this contract, like all others, should be voidable at his election. See the cases cited in the next note. Where a statute allows a parent to bind his son as an apprentice, undoubtedly an indenture executed in pursuance of such statute would bind all the parties to it; and the infant could not dissolve the relation thus created, but it would not necessarily follow that the remedy of the adult, for the desertion of the apprentice, would be an *action against him* on his covenants. See also *Harper v. Gilbert*, 5 Cush. 417.

(*f*) *Vent v. Osgood*, 19 Pick. 572; *Moses v. Stevens*, 2 Pick. 332; *Nickerson v. Easton*, 12 Pick. 110; *Francis v. Felmit*, 4 Dev. & Batt. 498; *Thomas v. Dike*, 11 Verm. 273; *Peters v. Lord*, 18 Conn. 337. And if an infant do avoid such contract, when part performed, he may recover on a *quantum meruit* for the labor actually performed under it. *Vent v. Osgood*, 19 Pick. 572; *Judkins v. Walker*, 17 Maine, 38; *Medbury v. Watrous*, 7 Hill, 110, (overruling the contrary cases of *McCoy v. Huffman*, 8 Cow. 84; *Weeks v. Leighton*, 5 New Hamp. 343; *Harney v. Owen*, 4 Blackf. 337.) Deducting it seems any injury the adult may have sustained by such avoidance. *Thomas v. Dike*, 11 Verm. 273; *Moses v. Stevens*, 2 Pick. 332; *Judkins v. Walker*, 17 Maine, 38. But see *Whitmarsh v. Hall*, 3 Denio, 375,

contra, as to deducting for injury to the adult.

(*g*) *Commonwealth v. Gamble*, 11 S. & R. 93; *Commonwealth v. Murray*, 4 Binn. 487; *United States v. Bainbridge*, 1 Mason, 71; *United States v. Blakeney*, 3 Grattan, 405.

(*gg*) The statutes of the United States provide that no person under the age of twenty-one years shall be enlisted without the consent of his parent, guardian, or master. See *United States v. Bainbridge*, 1 Mason, 71; *Commonwealth v. Harrison*, 11 Mass. 63; *Commonwealth v. Cushing*, 11 Mass. 67.

(*h*) *People v. Moores*, 4 Denio, 518. So where a father entered land in the name of his minor son, for the purpose of defrauding his creditors, and afterwards sold the land, which the son by his direction conveyed by his own deed, during his infancy, to the purchaser, it was held that such deed was one which the law would have compelled him to make, and therefore could not be avoided by him, on arriving at full age. *Elliott v. Horn*, 10 Ala. 348. In like manner equal partition of lands binds an infant. *Bavington v. Clarke*, 2 Penn. 115; *Commonwealth v. Hantz*, Id. 333. The binding effect of proceedings in partition in Pennsylvania, where a purport is accepted by the guardian, depends upon statutes. *Gilbach's Appeal*, 8 S. & R. 205.

(*i*) *Holt, C. J.*, *Williams v. Harrison*, Carth. 161; *Crosse v. Androes*, 1 Rol. Abr. 2, D. pl. 3.

(*ii*) *Cunningham v. Knight*, 1 Barb. 399.

SECTION IV.

OF THE TORTS OF AN INFANT.

An infant is protected against his contracts, but not against his frauds or other torts. (*j*) But his promissory note given as a compensation for his torts is not binding. (*jj*) If such tort or fraud consists in the breach of his contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract merely by a change in the form of the action, which the law does not permit. (*k*) But where the tort, though connected by circumstances with the contract, is still distinguishable from it, there he is liable. As if he hires a horse for an unnecessary ride he is not liable for the hire; but if in the course of the ride he wilfully abuses and injures the horse, he is liable for the tort. (*l*) And *if he should sell the horse, trover would lie, nor would his infancy be a good defence. Nor need this tort or fraud be subsequent to the contract. Thus, in the case of a bond given by an infant and received by the obligee in reliance upon his false and fraudulent representations of his being of full age, the bond cannot be enforced against him. (*m*)

(*j*) See *Stone v. Withipool*, Latch, 21; *Bullock v. Babcock*, 3 Wend. 391; *Hanks v. Deal*, 3 McCord, 257; *Green v. Sperry*, 16 Verm. 390; *Lewis v. Littlefield*, 15 Maine, 233; *Hartfield v. Roper*, 21 Wend. 615, 620; *Brown v. Maxwell*, 6 Hill, 592, 594; *Homer v. Thwing*, 3 Pick. 492; *School Dist. v. Bragdon*, 3 Fost. 516. He is even liable for his torts, though he act by his father's command. *Humphrey v. Douglass*, 10 Verm. 71; or through the agency of a third person. *Sikes v. Johnson*, 16 Mass. 389.

(*jj*) *Hanks v. Deal*, 3 McCord, 257.

(*k*) See *West v. Moore*, 14 Verm. 447; *Brown v. Durham*, 1 Root, 273; and *Morrill v. Aden*, 19 Verm. 505, that infancy is a bar to an action founded on a false and fraudulent warranty. But *contrà*, *Word v. Vance*, 1 Nott & McCord, 197; *Peigne v. Sutcliffe*, 4 McCord, 387; *The People v. Kendall*, 25

Wend. 399; *Jennings v. Rundall*, 8 T. R. 337.

(*l*) *Campbell v. Stakes*, 2 Wend. 137. And so he will be liable in trover if he drive the horse further, or on a different route, from that for which he has engaged him. *Homer v. Thwing*, 3 Pick. 492. Approved in *Green v. Sperry*, 16 Verm. 390; *Towne v. Wiley*, 23 Verm. 353. And see *Vasse v. Smith*, 6 Cranch, 226. But see *Wilt v. Welsh*, 6 Watts, 9; *Penrose v. Curran*, 3 Rawle, 351; 1 Am. Lead. Cases, 118, 119 (1st ed.); 10 Am. Jur. 98; 11 Id. 69; 20 Id. 264.

(*m*) *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Brown v. McCune*, 5 Sandf. 224. Neither will his warrant of attorney to confess judgment bind him, and the court cannot make it good, although there be fraud in the infant. *Saunderson v. Marr*, 1 H. Bl. 75. See also *Burley v. Russell*, 10 New Hamp. 184; *Stoolfoos v. Jenkins*, 12 S. & R. 399.

But as soon as the infant makes and delivers it he is guilty of a fraud, for which an action may be at once maintained for any loss sustained. (n) *As long as the bond runs, it is

(n) *Fitts v. Hall*, 9 New Hamp. 441; (overruling *Johnson v. Pie*, 1 Lev. 169, *contra*;) Com. Dig. Action on the Case for Deceit, A. 10; 2 Kent's Com. 241, note c.; Reeves's Dom. Rel. 259.—And in *Wallace v. Morss*, 5 Hill, 391, an infant who had fraudulently obtained goods upon credit, not intending to pay for them, was held liable in an action for the tort. But see *contra* *Brown v. McCune*, 5 Sandf. 224; *Price v. Hewett*, 18 E. L. & E. 522. The case of *Fitts v. Hall*, *supra*, is decidedly condemned in 1 Am. Lead. Cas. pp. 117, 118, where the learned editors say:—"This decision, which directly overrules *Johnson v. Pie*, 1 Levinz, 169, is clearly unsound; the representation by itself was not actionable, for it was not an injury; and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant. The contract, in such a case as *Fitts v. Hall*, forms an essential part of the right of action, and no liability growing out of contract can be asserted against an infant. The test of an action against an infant is, whether a liability can be made out without taking notice of the contract. It is admitted, in the same court, that such an affirmation as in *Fitts v. Hall* does not estop the infant so as to render him liable on the contract; which implies that the avoidance of a contract induced by such a representation is not a *fraud*." In the case referred to, *Parker, C. J.*, says:—"But *Johnson v. Pie*, 1 Lev. 169, was 'case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100, and so he had cheated the plaintiff by this false affirmation.' After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. 'Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, &c., for there is a fact done. Twysden doubted, for that infants are chargeable for trespasses. Dyer, 105; and so, if he cheat with false dice, &c.'

The report in Levinz states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested. If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his digest, 'Action on the case for Deceit,' but lays down the rule that 'If a man affirms himself of full age when he is an infant, and thereby procures money, to be lent to him upon mortgage,' he is liable for the deceit; for which he cites 1 Sid. 183; Com. Dig. Action, &c. A. 10: We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds, (2 Kent, 197,) as for slander, (*Noy's Rep.* 129, *Hodsman v. Grissel*,) and goods converted, (auth. *ante*), there is no sound reason that occurs to us why an infant should not be chargeable in damages for a fraudulent misrepresentation, whereby another has received damage." But it is believed that the true ground of the decision in *Fitts v. Hall* was mistaken in the Am. Lead. Cases, the learned authors being misled perhaps by the marginal note, in which it is said that "An infant is answerable for a fraudulent representation and deceit, which is not connected with the subject-matter of a contract, but by which the other party is induced to enter into one with him, *if he afterwards avoids the contract by reason of his infancy*." Such may have been the case before the court; but the principle to be deduced from the decision is that a fraudulent misrepresentation, whereby money or goods are obtained by an infant, is itself an actionable injury. It is stated in *Bac. Abr. Infancy & Age*, (I.) 3:—"If an infant, without any contract, wilfully takes away the goods of another, trover lies against him. Also it is said, that if he take the goods under pretence that he is of full age, trover lies, because it is a wilful and

not clear that he will not pay it; and this uncertainty should perhaps reduce the damages to a nominal amount. But when he refuses to pay, and avoids the bond, by this refusal he gives no new cause of action, but now in the action grounded upon the original tort, full damages may be given. It might be held, however, that before any action could be maintained for the fraud in making such a bond, either he must have refused payment, or else the bond should be returned to him; and then the plaintiff would be entitled to recover the full amount of the bond. And if goods were sold to an infant in reliance upon his fraudulent representations that he was of full age, the seller may reclaim them, certainly on his refusal to pay, if not before, on the ground that he had never parted with his property. (o)

When goods not necessities are sold to an infant, without fraudulent representations by him, with a knowledge by the seller of his infancy, and the infant refuses to pay for them, and also refuses to return the goods, although they are within * his possession and control, some question exists as to the rights of the seller. Some authorities support the doctrine that he is remediless, regarding the incapacity of the infant as his privilege and his defence. But it seems unreasonable and unjust to say that the infant may refuse to pay for the goods, without affecting the validity of the sale to him. It should seem enough if the infant has the power of rescinding the sale. This is an adequate protection; and if the goods are out of his possession when the sale is rescinded, the seller may be wholly without remedy. But when the sale is rescinded, the property in the goods should revert in the seller, so far, at least, that if he finds them in the possession of the

fraudulent trespass." So an infant is liable for a fraudulent execution of a trust confided to him. *Loop v. Loop*, 1 Verm. 177.

(o) *Badger v. Phinney*, 15 Mass. 359; *Mills v. Graham*, 4 B. & P. 140, Per *Mansfield*, C. J.; *Furnes v. Smith*, 1 Rol. Abr. 530, C. pl. 3. It has been suggested that the mere silence of the infant as to his age, knowing that the other party believed him an adult, would be a sufficient ground to enable the other party to reclaim the goods so

parted with. See 20 Am. Jur. 265. But in *Stikeman v. Dawson*, 1 De Gex & Smale, 90, it was held, that in the absence of any positive misrepresentation, the mere omission of the infant to disclose his minority was not a sufficient fraud to invalidate the contract. So his note is voidable, although the payee did not know of his infancy and although he was carrying on trade as an adult. *Van Winkle v. Ketcham*, 3 Caines, 323.

infant, he may peaceably retake them as his own. And if he demands them, the refusal of the infant to deliver them would seem to be a tort wholly independent of the contract, on which trover might be maintained. And there are authorities which sustain this view. (*p*) At all events, it seems

(*p*) Judge *Reeve* states similar views in his work on the Domestic Relations, p. 244. He says:—"But it seems to have been an opinion among the elementary writers, that if a contract be performed by the adult to the infant, and then the infant refuse to perform his part, and this contract be rescinded; that, in such cases, the adult has no remedy to recover the consideration paid to the minor. So that if a minor should contract to pay an adult \$50 for a horse, sold to him by the adult, and then the minor should rescind the contract, that the adult must lose his horse. Or if a minor should buy a horse, and pay for him, that he might rescind the contract, and recover back the money, and yet retain the horse; it being a presumption of law, as they say, that the consideration paid or delivered by the adult was intended as a present to the minor. This doctrine appears to me to be wholly destitute of principle, and not supported by the authorities. That the minor has a right to rescind his contract at pleasure is not controverted; but when rescinded I should suppose that the contract was as if it had never been, and that the minor could never retain when he had rescinded. I apprehend it to be a sound maxim, and which is founded in the highest reason, that an infant, although he may always use his privilege, as a shield to defend himself against his own contracts, yet he shall never make use of it as an offensive weapon to injure others. It is enough that an infant shall have full power to set afloat his contract. In doing this he is in the proper use of his privilege; but to obtain, by that means, property from others, is a fraud; and is turning his privilege into an offensive weapon, which the law will not indulge. It is true that the lawful exercise of this privilege will produce the effect of defrauding others, in many cases. As where an infant has bought a horse, and given his note for the value, and then avoids his note by a plea of infancy; and

has sold the horse, spent the money received, and is unable to pay the value of the horse: in this case the adult may be defrauded, but it is because the minor is unable to pay, or make him satisfaction. But how, in point of principle and good sense, would the case be, if the infant were in possession of the horse at the time he avoided the note? Would not the whole contract be utterly void, and as much blotted out of existence, as if it had never been? and would not the horse then be the property of the adult, the infant having received the full benefit of his privilege; that is, the privilege of not being bound by his contract? And if the property of the horse were in the adult, he might retake him in a peaceable manner prescribed by law, and might demand him of the infant; and in the case of refusal might bring an action of trover against the minor, for converting the horse to his own use." Judge *Metcalf*, in his very valuable articles on the Law of Contracts, in the *American Jurist*, says, vol. 20, p. 260:—"But where the infant refuses to pay for articles sold to him, the other party cannot retake the articles; and where he has received money for property which he engaged to deliver to the purchaser, and afterwards refuses to deliver, his privilege (as it is termed) is his defence. This is manifestly inequitable, and Judge *Reeve* therefore zealously contends that such is not the law. But the principles of the law of infancy, seem to lead to this result, and the authorities to be too stubborn to be resisted." We confess that we think the views of Judge *Reeve* more consonant with the principles of law, as well as of equity. The infant is not bound by his promise; but this must mean that the promise was void, or may be made void, and when void it is as if it had not been; and therefore when the infant has defeated the claim of the seller for the price by avoiding his promise, there is an end of the contract. We see no sufficient reason for connecting his subsequent wrongdoing,

to be admitted that if the infant has received the goods and paid for them, he cannot avoid the contract and recover the money paid, without redelivering the goods. (*pp*)

SECTION V.

OF THE EFFECT OF AN INFANT'S AVOIDANCE OF HIS CONTRACT.

Every executory contract may be avoided by an infant, and then the adult dealing with him is relieved from his part of the contract; as if the contract were for the sale of a horse by the infant, and the infant refuses to deliver the horse, the adult of course may refuse to pay the price. But if it be executed on the part of the adult,—as, for instance, by the payment in advance for the horse,—and the infant then annuls the contract, and refuses to deliver the horse, the rights of the other party are not so certain. (*q*) If, previous to the contract, the infant fraudulently represented himself as of age, we have seen, that for this fraud he may be answerable. But, if there were no such representations, it is not clear that

in refusing to redeliver the property, with the contract, so as to say the owner now sues substantially for a breach of the contract, although formally, in tort. He demands, in fact as well as in form, damages for the wrongful detention of property which is his, because it *was* his, and has never passed out of him but by a contract which the infant has exercised his right of rescinding. We think the case of *Vasse v. Smith*, 6 Cranch, 226, rests upon similar principles. There the defendant received goods as supercargo, but disposed of them in disobedience to the orders of the owner, who brought trover. The defendant pleaded and proved infancy, and the court below held it to be a sufficient defence. *Marshall, C. J.*, in delivering the opinion of the supreme court, said:—“This court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omis-

sion, but of commission, and is within that class of offences for which infancy cannot afford protection. . . . This instruction of the court (below) must have been founded on the opinion that infancy is a bar to an action of trover for goods committed to the infant under a contract. . . . This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession.” We think that *Badger v. Phinney*, 15 Mass. 359, and *Fitts v. Hall*, 9 New Hamp. 441, imply similar principles.

(*pp*) *Holmes v. Blogg*, 8 Taunt. 508; *Bailey v. Barnberger*, 11 B. Mon. 113; *Smith v. Evans*, 5 Humph. 70; *Cummings v. Powell*, 8 Texas. 80. And see *Harney v. Owen*, 4 Blackf. 337; *Weeks v. Leighton*, 5 N. H. 343; *Medbury v. Watrous*, 7 Hill, 110.

(*q*) See *Shaw v. Boyd* 5 S. & R. 309; *Crymes v. Day*, 1 Bailey, 320; *Jones v. Todd*, 2 J. J. Marsh. 361; 20 Am. Jur. 260.

the adult party has any remedy. He cannot bring trover for the horse, for it was never his ; nor case, unless he can found his action upon a wrong independent of the contract ; he cannot therefore recover the money unless on the ground that the entire avoidance of the sale has left the infant in possession of money which belongs only to the adult. If the infant disaffirms a sale that he has made, and reclaims the property he sold, it seems now quite well settled that he must return the purchase-money. (r)

If, during infancy, he has destroyed or parted with the property he purchased before a demand was made upon him for it subsequently to his disaffirmance, the seller, as we have said, is remediless ; but if he destroys or disposes of the property after coming of age, this must be regarded as a confirmation of the contract. (s)

If an infant advances money on a voidable contract, which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money, unless it was obtained from him by fraud. Whether an infant who has engaged to labor for a certain period, and, after some part of the work is performed, rescinds the contract, can recover for the work he has done, has been differently decided. (t) The principle upon which the rule is founded that forbids the infant's recovery of money advanced by him on a contract which he has rescinded, would appear to lead to the conclusion that he could not recover for the work he had done ; but the weight of authority seems to be the other way. As to the time of an infant's disaffirmance of his contract, it may be said, in general, that he cannot avoid a sale of lands,

(r) *Badger v. Phinney*, 15 Mass. 363 ; *Hubbard v. Cummings*, 1 Greenl. 13 ; *Smith v. Evans*, 5 Humph. 70 ; *Farr v. Sumner*, 12 Verm. 28. See also *Taft & Co. v. Pike*, 14 Verm. 405. And for the rule in chancery, that if an adult files his bill to set aside a conveyance made when under age, he must offer to restore the purchase-money, see *Hillyer v. Bennett*, 3 Edwards's Chancery, 222. So if the indorsee of an infant payee is

paid, the infant cannot avoid his indorsement, because he cannot restore the maker of the bill or note to the same condition as before. See *Duly v. Brownfield*, 1 Barr. 497 ; *Willis v. Twambly*, 13 Mass. 204 ; *Nightingale v. Withington*, 15 Mass. 272.

(s) *Cheshire v. Barrett*, 4 McCord, 241 ; *Deason v. Boyd*, 1 Dana, 45 ; *Lawson v. Lovejoy*, 8 Greenl. 405.

(t) See note (f) *supra*, p. *263.

conclusively, until of full age, (*u*) although he may enter while under age and take and hold the profits. (*v*) The disaffirmance may be by any appropriate legal process, or by any act on his part showing conclusively his purpose of annulling the sale. Contracts which relate only to the person or to personal property may be avoided at any time, and by any act clearly manifesting this purpose. (*w*) And this right may be exercised against all equities of purchasers from the grantee, or other persons. (*x*)

An infant stands on the same footing as an adult, in respect to his rights to reclaim money on a failure of consideration, or because obtained by fraud, or to rescind contracts for good cause.

SECTION VI.

• OF RATIFICATION.

As the liability of the infant is defeated by the law, for his protection, therefore, as we have already seen, when he is of full age, he may, if he pleases, confirm and ratify a contract entered into by him during infancy, and this by parol. (*y*) But, for this ratification, a mere acknowledgment that the debt existed or that the contract was made is not enough. (*z*) It need not be a precise and formal promise; but it must be

(*u*) *Stafford v. Roof*, 9 Cowen, 626; *Bool v. Mix*, 17 Wend. 120; *Matthewson v. Johnson*, 1 Hoffman's Chancery, 560; *Shipman v. Horton*, 17 Conn. 481; *Cummings v. Powell*, 8 Tex. 80. See also *ante*, p. 243, note (*u*).

(*v*) *Stafford v. Roof*, 9 Cow. 626.

(*w*) See *supra*, note (*u*). For a *dictum contra*, see *Boody v. McKenney*, 23 Maine, 517. See also *Farr v. Sumner*, 12 Verm. 28.

(*x*) *Myers v. Sanders*, 7 Dana, 506; *Hill v. Anderson*, 5 S. & M. 216.

(*y*) In England, by stat. 9 Geo. 4, c. 14, § 5, it is now necessary that the new promise or ratification be in writing, and signed by the party to be charged thereby. And any written instrument signed by the party, which in an adult would be an adoption or ratification of an act done by one acting as agent, is

sufficient. *Harris v. Wall*, 1 Exch. R. 122. See also *Hartley v. Wharton*, 11 Ad. & El. 934. A similar statute exists in Maine.—In *Baylis v. Dinely*, 3 M. & S. 477, it seems to have been held that an instrument under seal, executed while the maker was an infant, could not be affirmed *by parol*. But this is believed to be inconsistent with true principle and analogous cases. See *Hoyle v. Stowe*, 2 Dev. & Batt. 320; *Wheaton v. East*, 5 Yerg. 41; *Houser v. Reynolds*, 1 Hayw. 143. But see *Clamorgan v. Lanc*, 9 Missouri, 446.

(*z*) *Robbins v. Eaton*, 10 New Hamp. 561; *Thrupp v. Fielder*, 2 Esp. 628; *Ordinary v. Wherry*, 1 Bailey, 28; *Benham v. Bishop*, 9 Conn. 330; *Alexander v. Hutcheson*, 2 Hawks, 535; *Ford v. Phillips*, 1 Pick. 203.

a direct and express confirmation, and *substantially* (though it need not be *in form*) a promise to pay the debt or fulfil the contract. (a) It must be made with the deliberate purpose of assuming a liability from which he knows that he is discharged by law, and under no compulsion; (b) and to the

(a) See *Goodsell v. Myers*, 3 Wend. 479; *Rogers v. Hurd*, 4 Day, 57; *Wilcox v. Roath*, 12 Conn. 550; *Hale v. Gerrish*, 8 New Hamp. 374; *Bigelow v. Grannis*, 2 Hill, 120; *Willard v. Hewlett*, 19 Wend. 301. The cases are well collected in Bingham on Infancy, Am. ed. p. 69, note. "No particular words seem necessary to a ratification, and provided they import a recognition and confirmation of his promise, they need not be a direct promise to pay. *Whitney v. Dutch*, 14 Mass. 460, *Parker, C. J.*; *Hale v. Gerrish*, 8 New Hamp. 376; as "I have not the money now, but when I return from my voyage I will settle with you;" and "I owe you, and will pay you when I return," have been held a sufficient ratification. *Martin v. Mayo*, 10 Mass. 137; also, these words, "I will pay it (the note) as soon as I can make it, but not this year. I understand the holder is about to sue it, but she had better not." *Bobo v. Hansell*, 2 Bailey, (S. C.) 114. So a promise to endeavor to procure the money and send it to the creditor is sufficient. *Whitney v. Dutch*, 14 Mass. 457; and where a minor after coming of age wrote to the plaintiff, "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time," this was held a sufficient ratification. *Hartley v. Wharton*, 11 Ad. & El. 934. See also *Harris v. Wall*, 1 Exch. 128, where it is said that any written instrument signed by the infant, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. A declaration of an intention to pay a note, and authorizing an agent to take it up, has been held a good ratification, although the agent had done nothing about it. *Orvis v. Kimball*, 3 New Hamp. 314; see further *Best v. Givens*, 3 B. Monr. 72. On the other hand, an admission by an infant that he owed the debt, and that the adult *would get his pay*, but

at the same time refusing to give his note, was considered no ratification of the original promise. *Hale v. Gerrish*, 8 New Hamp. 374; and so these words, "I owe the plaintiff, but am unable to pay him, but will endeavor to get my brother bound with me." *Ford v. Phillips*, 1 Pick. 202; likewise the language, "I consider your claim as worthy my attention, but not my first attention," adding he would soon give it the attention due it. *Wilcox v. Roath*, 12 Conn. 550; and where a minor gave his note, and a part of which he subsequently paid, and in his will made after attaining majority directed the payment of his just debts, this was held no ratification as to the residue of the note. *Smith v. Mayo*, 9 Mass. 62; but see *Wright v. Steele*, 2 New Hamp. 51; 20 Am. Jur. 269; *Merchants, &c., v. Grant*, 2 Edw. Ch. R. 544. And where a minor received money, which he promised in writing to pay to another when requested, and, on being applied to, said it was not convenient to pay then, but expressed an *intention* to do so on his arrival at Honduras; this was held no ratification of his *promise* to repay, however otherwise, he might have been liable. *Jackson v. Mayo*, 11 Mass. 147. Neither is a submission to arbitration, whether he is liable or not, on his note, a ratification. *Benham v. Bishop*, 9 Conn. 330; nor is a partial payment any ratification to the remainder. *Thrupp v. Fielder*, 2 Esp. 628; *Robbins v. Eaton*, 10 New Hamp. 561; *Hinely v. Margarith*, 3 Barr, 428. If the ratification is conditional, as, to pay when able, the plaintiff must show the happening of the contingency, but not that the defendant could pay *without inconvenience*. *Thompson v. Lay*, 4 Pick. 48; *Cole v. Saxby*, 3 Esp. 159; see also *Davis v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116; *Martin v. Mayo*, 10 Mass. Rand's ed. 141, n. (c); *Everson v. Carpenter*, 17 Wend. 419."

(b) *Ford v. Phillips*, 1 Pick. 202; *Smith v. Mayo*, 9 Mass. 64; *Curtin v. Patton*, 11 Serg. & Rawle, 307; *Harmer*

party himself or his agent. (c) It may be conditional, and in that case the party relying upon it must show that the condition has been fulfilled. (d) But it is perhaps now settled that a ratification will not maintain an action brought before such ratification. (e)

The mere fact that an infant does not disaffirm a contract after he is of full age, is not, it would seem, of itself a confirmation; (ee) but this fact may be made significant by circumstances; if coupled with a continued possession and use of property, or a refusal to redeliver the same, and an assertion of ownership, it may frequently raise by implication of law such confirmation and a promise to pay for the property; especially if either this intention and promise to pay must be presumed, or a fraud. Indeed, any act of ownership, after full age, may have this effect; but it must be unequivocal.

The purchases of an infant may be far more easily ratified than his conveyances of real estate. To affirm the latter some positive act seems to be necessary, and mere acquiescence, or failure to *disaffirm*, although continued beyond a reasonable time, has frequently been adjudged not sufficient to bind the minor. (f) It has been held in England that an

v. Killing, 5 Esp. 102; *Brooke v. Gally*, 2 Atk. 34; *Hinely v. Margaritz*, 3 Barr, 428.

(c) *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill, 120; *Hoit v. Underhill*, 9 New Hamp. 436.

(d) *Thompson v. Lay*, 4 Pick. 48; *Cole v. Saxby*, 3 Esp. 159. See also *Davies v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116; *Everson v. Carpenter*, 17 Wend. 419.

(e) *Thornton v. Illingworth*, 2 B. & C. 824; *Ford v. Phillips*, 1 Pick. 202; *Thing v. Libbey*, 16 Maine, 55; *Merriam v. Wilkins*, 6 New Hamp. 432, (overruling the earlier case of *Wright v. Steele*, 2 New Hamp. 51); *Hale v. Gerrish*, 8 New Hamp. 374; *Goodridge v. Ross*, 6 Met. 487.

(ee) *Bennett's note to Dublin and Wicklow Railway Co. v. Black*, 16 E.L. & E. 558. But see post notes (f) and (i)

(f) In *Jackson v. Carpenter*, 11 Johns. 539, an infant conveyed land to A. in fee in the military tract, in 1784. Afterwards in 1796, and ten years after

he became of age, he conveyed the same premises to B. A. claimed that the first deed was only voidable, and not void, and that there had been an acquiescence for so long a time after the infant arrived at full age, that it amounted to a confirmation of the first conveyance, before the second was executed. But the court said, in giving their opinion:—"The cases cited by the defendant's counsel, to this point, do not support it to the extent contended for. In all of them it appears that some act of the infant, after he is twenty-one years of age, is required to evince his assent; they are only instances of purchases made, or leases given, rendering a rent by which either the continuance in possession or receipt of the rent reserved shows his assent afterwards. In the present case, no act of the infant appears since he arrived at full age, by which this assent could be inferred, except mere omission. He has possessed no property, nor has he received rent. The confirmation of this sale, conse-

infant's bond could not be ratified but by an instrument of equal solemnity. But this has been doubted for strong reasons. (g) But whether verbal declarations can, in any event

quently, can, in no point of view, turn out to his advantage, nor can his neglect to do any thing from 1784 till 1796 destroy his title. It would be contrary to the benign principles of the law, by which the imbecility and indiscretion of infants are protected from injury to their property, that a mere acquiescence, without any intermediate or continued benefit, showing his assent, should operate as an extinguishment of his title." So, in *Jackson v. Burchin*, 14 Johns. 124, an infant in 1784, and while between nineteen and twenty years of age, conveyed wild and unoccupied land in fee, and in 1795 executed another conveyance of the same premises, not having in the mean time after his arrival of full age made any entry on the premises. It was also proved that the infant, after he came of age, had stated to others that he had sold his land to [the first grantee.] The defendant also offered to prove that the infant, after he became of full age declined to sell the premises on one occasion, because he had previously sold it, but this was overruled. *Spencer, J.*, in delivering the opinion, observed:—"I perceive no evidence of the affirmance of the first deed by the infant after he came of age." These cases were commented upon in *Bool v. Mix*, 17 Wend. 120, and the court incline to the same general doctrine. So in *Tucker v. Moreland*, 10 Peters, 58, Mr. Justice Story observed:—"To assume, as a matter of law, that a voluntary and deliberate recognition by a person, after his arrival at age, of an actual conveyance of his right, during his non-age, amounts to a confirmation of such conveyance; or to assume that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it, are not maintainable. The mere recognition of the fact that a conveyance has been made, is not, *per se*, proof of a confirmation of it." In *Lessee of Drake v. Ramsay*, 5 Hammond, 251, the court remarked:—"In our opinion lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title [of the first purchaser]; but of itself it does not

take away the right to avoid until the statute of limitations takes effect." The same doctrine was afterwards affirmed in *Cresinger v. Lessee of Welch*, 15 Ohio, R. 193. In the very able case of *Doe v. Abernathy*, 7 Blackf. 442, it appeared that a female infant, residing in Pennsylvania, executed there a deed of bargain and sale for land situate in that State. She afterwards married, but whether before or after her majority did not appear, nor did it appear where, after the execution of the deed, she and her husband had resided, nor that her husband had acquiesced in the deed after he knew of it. Held, that the lapse of about five years after the wife's majority, without any attempt to disaffirm the conveyance, did not, under the circumstances, prevent the husband and wife from disaffirming it. In *Boody v. McKenney*, 23 Maine, 523, *Shepley, J.*, thus lays down the law on this subject:—"When a person has made a conveyance of real estate during infancy, and would affirm or disaffirm it after he becomes of age, in such case the mere acquiescence for years to disaffirm it affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty towards others to act speedily. Language appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may, therefore, after years of acquiescence, by an entry, or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy." This point was discussed in *Hoyle v. Stowe*, 2 Dev. & Batt. 320, where it was held that some act of affirmance was clearly necessary, and that if declarations were sufficient, they must be clear and unequivocal, and made with a view to ratification. In *Houser v. Reynolds*, 1 Hayw. 143, such declarations were held sufficient. See, however, *Clamorgan v. Lane*, 9 Missouri, 446.

(g) Parole ratification was claimed

ratify an instrument under seal, it is quite certain that if, in an instrument under seal, a person recites or refers to a former instrument also under seal, made while the party was a minor, this is a ratification of the first. (*h*)

In some cases it has been urged that even a silent acquiescence for a considerable time by an infant, after arriving at full age, is itself a ratification of his conveyances. (*i*)

in *Baylis v. Dinely*, 3 M. & S. 477. But see, *contra*, *Hoyle v. Stowe*, 2 Dev. & Batt. 320; *Wheaton v. East*, 5 Yerg. 41; *Houser v. Reynolds*, 1 Hayward, 143; *Scott v. Buchanan*, 2 Humph. 468. But see *Clamorgan v. Lane*, 9 Missouri, 446.

(*h*) See *Story v. Johnson*, 2 Younge & Coll. 586; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Phillips v. Green*, 5 Monroe, 344.

(*i*) In *Kline v. Beebe*, 6 Conn. 494, where an infant, having executed a deed of conveyance in 1791, at the age of eighteen years, held the note given for the consideration four years, and then married; her husband held it until her death in 1815, and continued to hold it eleven years afterwards; and, during the whole period, there was no act or expression of disaffirmance, and the grantee was permitted to remain in the undisturbed occupation of the land, it was held that there was both an *implied* and a *tacit* affirmance. *Hosmer, C. J.*, said:—"The deed in question has been ratified by every implied mode of affirmance. The consideration note was held by P. Bolles a year after her arrival at full age, and before her marriage, and by the plaintiff has been held ever since. During all this period, until the commencement of the plaintiff's action, a profound silence was observed relative to the disaffirmance of the contract; and the defendant was permitted to remain in the unquestioned occupation of the land. These acts imply an affirmance of the deed, not unlike the holding possession of land leased or exchanged, and authorized the same inference. Besides, the omission to disaffirm alone, for eleven years, a period almost sufficient to give title by possession, is an acquiescence in the conveyance amounting to a tacit affirmance." This case was cited with approbation in *Richardson v. Boright*, 9 Verm. 368, where *Redfield, J.*, said:—"In the case

of every act of an infant merely voidable, he must disaffirm it on coming of full age, or he will be bound by it." See also *Holmes v. Blogg*, 8 Taunt. 35, *Dallas, J.*; 2 Kent, Comm. 238.—The case of *Wallace v. Lewis*, 4 Harring. 75, is a strong case against the right of disaffirmance. There a minor, when wanting only four months of his majority, conveyed his land in fee by deed in proper form, and the purchaser went into immediate possession, and greatly improved the premises. The infant, four years after, brought his action of ejectment against his own grantee, to recover the same premises. It was held that his silence for four years after he became of age was a waiver of his right to disaffirm, and that he could not recover. And see also *Scott v. Buchanan*, 11 Humph. 468. But see *Moore v. Abernathy*, 7 Blackf. 442. So in *Wheaton v. East*, 5 Yerg. 41, it was held that any act of a minor, from which his assent to a deed executed during his minority may be inferred, will operate as a confirmation, and prevent him thereafter from electing to disaffirm it. Therefore where the minor had done no act from which a dissent or disaffirmance might be inferred, for three or four years after he arrived at twenty-one, but where he admitted he had sold the land, said he was satisfied, offered to exchange other lands for it, and saw the bargainee putting on improvements without objection, it was held that these were sufficient acts from which to infer a confirmation. We have thus fully referred to the authorities on the subject of the ratification of conveyances, because there is, as will be seen by a reference to the foregoing cases, not a little conflict between them. On the other hand, as to purchases, the law is well settled; and if an infant retains property purchased, whether real or personal, and gives no notice of an intention to disaffirm, for an unreasonable length of time after he arrives at full

If any act of disaffirmance is necessary to enable an infant after attaining his majority to avoid his conveyance made while a minor, it is now well settled that the execution of a second deed, which is inconsistent with the former deed, is itself a disaffirmance of the former deed, although the infant had not previously manifested any intention to avoid it, and had made no entry upon the premises conveyed. The old rule, requiring such entry before the infant could make another conveyance, has long since been done away. (*j*) In some of our States, however, a sale of lands can be made

age, and especially if he uses the property, sells it, or mortgages it, or exercises any unequivocal act of ownership over it, without any notice to the other party of an intention to disaffirm, this is clearly sufficient evidence of a ratification. Some of the leading cases on this subject are *Boyden v. Boyden*, 9 Met. 519; *Boody v. McKenny*, 23 Maine, 517; *Hubbard v. Cummings*, 1 Greenl. 11, where this doctrine is applied to the purchase of real estate; *Co. Litt.* 51, b; *Robbins v. Eaton*, 10 New Hamp. 561; *Cheshire v. Barrett*, 4 McCord, 241; *Lawson v. Lovejoy*, 8 Greenl. 405 (Bennett's ed. and note); *Alexander v. Heriot*, Bailey, Ch. 223; *Armfield v. Tate*, 7 Ired. 258; *Kitchen v. Lee*, 11 Paige, 107; *Deason v. Boyd*, 1 Dana, 45. — And where an infant, a few days before he became twenty-one, purchased a note and drew an order on a third person for the payment, but which was not paid, of which he had notice, it was held in a suit on such order, several years afterwards, that his failure to return the note and disaffirm the contract, after he became of age, warranted the inference that he intended to abide by it, and was a sufficient answer to the defence of infancy. *Thomasson v. Boyd*, 13 Ala. 419. In *Delano v. Blake*, 11 Wend. 85, where an infant took the note of a third person in payment for work done, and retained it for eight months after he came of age, and then offered to return it, and demanded payment for his work, it was held, in an action for the work and labor performed by him, that the retaining of the note for such a length of time was a ratification of the contract made during infancy, especially when, in the mean time, the maker of the note had become insolvent, the debt lost, and the offer to

return made on the heel of that event. In *Aldrich v. Grimes*, 10 New Hamp. 194, an infant bought personal property, with a right of return if it was not liked. He kept it two months after he was of full age, and after he had been requested to return it if he did not like it. It was held a confirmation. In the late case of *Smith v. Kelly*, 13 Met. 309, an infant bought goods that were not necessities, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ. The goods remained in the hands of the attaching officer at the time of the trial of the action, and the defendant gave no notice to the plaintiffs, after he came of age, of his intention not to be bound by the contract of sale. *Held*, that there was not a ratification of the contract of sale by the defendant, and that the action could not be maintained. If an infant purchase land, and at the same time mortgage it for the purchase-money, so that the whole is but one transaction, the retaining of possession of the land beyond a reasonable time is a confirmation of the mortgage, and any act that ratifies the mortgage affirms the deed. *Bigelow v. Kinney*, 3 Verm. 353; *Richardson v. Boright*, 9 Verm. 368; *Robbins v. Eaton*, 10 New Hamp. 562; *Dana v. Coombs*, 6 Greenl. 89; *Hubbard v. Cummings*, 1 Greenl. 11; *Lynde v. Budd*, 2 Paige, 191. — Upon the whole it may be said, that an infant's conveyances are not ratified by a bare recognition of the existence of, or a silent acquiescence in his deed, for any period less than the period of statutory limitation. See the cases already cited.

(*j*) *Cresinger v. Welch*, 15 Ohio R. 156; *Hoyle v. Stowe*, 2 Dev. & Batt. 320; *Tucker v. Moreland*, 10 Peters,

only by one in possession; and in that case the infant should enter before making his conveyance.

*A question has been raised in relation to ratification by an infant, whether, if the contract be one of those which is declared to be not voidable, but void, any ratification could restore it. And contracts by an infant for purposes of trade have been declared absolutely void. But the exact distinction between the void and the voidable contracts of an infant is rather obscure; and the better opinion, as well as the stronger reason, seems to be, as we have already stated, that in reference to its ratification, no contract is void; or, in the language of Parke, B., in *Williams v. Moore*, (*k*) "the promise of an infant is not *void* in any case, unless the infant chooses to plead his infancy." (*l*)

58; *Jackson v. Carpenter*. 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124. But to constitute a disaffirmance, the second deed must be so inconsistent with the first that both cannot consistently stand. *Eagle Fire Company v. Lent*, 6 Paige, 635; *Bingham on Infancy*, Bennett's ed. p. 60, note.

(*k*) 11 M. & W. 256.

(*l*) The words "void" and "voidable" have often been very vaguely used when applied to contracts, and the word *void* has been frequently used to denote merely that the contract was not *binding*, and as expressing no opinion whether such contract might or might not be ratified. Thus, in *Conroe v. Birdsall*, 1 Johns. Cas. 127, the marginal note indicates that the court held the contract "*void*," and the case is so cited in *Mason v. Denison*, 15 Wend. 71; and in 2 Kent's Com. 241; but the language of the court was:—"The bond is *voidable*, only at the election of the infant." So in *Curtin v. Patton*, 11 S. & R. 311, Mr. Justice *Duncan*, speaking of an infant's contract of suretyship, calls it in one place "absolutely void," but in the very next line he makes use of such expressions as "*confirming*," "*distinct acts of confirmation*," &c., plainly showing that, while calling the contract *void*, he did not mean to deny that it was *sus-*

ceptible of ratification, and if so, that it was not "absolutely void," but only voidable, as it has often been held by the same court. *Hinely v. Margaritz*, 3 Barr, 428. In a similar manner, *Bayley, J.*, in *Thornton v. Illingworth*, 2 B. & C. 824, speaking of an infant's contract of trade, calls it *void*, but the case clearly shows that if the ratification which was shown in the case had been *before* the action was commenced, instead of *after*, the infant would have been bound, a conclusion impossible, had the contract been really void. So an infant's acceptance of a bill of exchange has been called "void," but it is only voidable, and is susceptible of a ratification. *Gibbs v. Merrill*, 3 Taunt. 307. Another instance occurs in the application of the word "void" to fraudulent contracts, but they are only *voidable*, and if the person defrauded choose to ratify, he may do so, and hold the other party. *Ayers v. Hewett*, 19 Maine, 281. These instances are sufficient to illustrate the vague and indefinite use of the word "*void*," and may perhaps serve to reconcile the conflicting language of some cases, and to account for the application of the word "*void*" to any of an infant's contracts. See also *ante*, p. 244, note (*e*).

SECTION VII.

WHO MAY TAKE ADVANTAGE OF AN INFANT'S LIABILITY.

It is a general rule that the disability of infancy is the personal privilege of the infant himself, and no one but *himself or his legal representatives can take advantage of it. (m) Therefore other parties who contract with an infant are bound by it, although it be voidable by him. Were it otherwise this disability might be of no advantage to him, but the reverse. (n) Thus, an infant may sue an adult for a breach of promise of marriage, although no action can be brought against an infant for that cause. (o) And an infant may bring an action on a mercantile contract, though none can be brought against him. (p) So in contracts of appren-

(m) *Parker v. Baker*, 1 Clarke's Ch. 136; *Gullett v. Lamberton*, 1 Eng. R. (Ark.) 109; *Rose v. Daniel*, 3 Brev. 438; *Voorhees v. Wait*, 3 Green, 343. This privilege extends to the infant's personal representatives. *Smith v. Mayo*, 9 Mass. 62; *Jefford v. Ringgold*, 6 Ala. 544; *Marten v. Mayo*, 10 Mass. 137; *Hussey v. Jewett*, 9 Mass. 100; *Jackson v. Mayo*, 11 Mass. 147; *Parsons v. Hill*, 8 Missouri, 135, and to his privies in blood, Bac. Abr. Infancy, (I.) 6; *Austin v. Charlestown Female Seminary*, 8 Met. 196. But not to his assignees, or privies in estate only. *Id.* *Whittingham's case*, 8 Co. Rep. 43; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Hoyle v. Stowe*, 2 Dev. & Batt. 323. Nor to a guardian. *Oliver v. Houdlet*, 13 Mass. 237; *Irving v. Crockett*, 4 Bibb, 437. It is on this ground, connected with others, that parties to negotiable paper cannot take advantage of the infancy of any prior party. *Jones v. Darch*, 4 Price, 300; *Grey v. Cooper*, 3 Doug. 65; *Nightingale v. Withington*, 15 Mass. 272; *Taylor v. Croker*, 4 Esp. 187; *Dulty v. Brownfield*, 1 Barr, 497.

(n) *Boyden v. Boyden*, 9 Met. 519, 521, *Shaw, C. J.*; *McGinn v. Shaeffer*, 7 Watts, 412, 414.

(o) *Hunt v. Peake*, 5 Cow. 475; *Pool v. Pratt*, 1 D. Chipman, 252; *Willard v. Stone*, 7 Cow. 22; *Holt v. Ward Cla-*

rencieux, 2 Strange, 937. And the infant may sue for a breach of such promise, without averring consent of his parent or guardian. *Cannon v. Alsbury*, 1 A. K. Marsh. 76.

(p) In *Warwick v. Bruce*, 2 M. & S. 205, the defendant, on the 12th of October, agreed to sell to the plaintiff, a minor, all the potatoes then growing on three acres of land, at so much per acre, to be dug up and carried away by plaintiff; and the plaintiff paid £40 to the defendant under the agreement, and dug a part, and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue. It was held that the infant was entitled to recover for this breach of the agreement. *Lord Ellenborough, C. J.* "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid £40, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between

ticeship, or in cases of hiring and service. (*q*) In none of these cases can the adult discharge himself by alleging that there was no consideration for his promise, on the ground that the promise of the infant did not bind him. The mutuality or reciprocity of the contract or obligation is not complete, but it is sufficient to bind the party of adult age to his part of the contract. But if a person of adult age marry one who is under the age of consent, (in males fourteen, and females twelve years,) such marriage is binding upon neither party; and it is in the power of either to disagree when the infant comes to the age of consent, though not before. (*r*) But we shall speak of this more fully when treating of the Contract of Marriage.

SECTION VIII.

OF THE MARRIAGE SETTLEMENTS OF AN INFANT.

The power of an infant in respect to marriage settlements has been much discussed. It seems to be determined, that a marriage settlement upon a female infant, and her release of dower in consideration of such settlement, are valid. (*s*) But whether she can bind herself by a settlement of her own estate in contemplation of marriage, seems still to be regarded as an open question. (*t*) It is certain that a female infant may marry; and therefore it might be supposed that a prudent settlement of her property, in view of marriage, would

the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do. It is certainly for the benefit of infants, where they have given the fair value for any article of produce, that they should have the thing contracted for. And it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage, and I am not aware that this objection has ever been taken since the case in *Strange*."

(*q*) *Eubanks v. Peak*, 2 Bailey, 497.

(*r*) *Bac. Abr. Infancy and Age*, (A.)

(*s*) *Drury v. Drury*, 2 Eden, 39; *Earl of Buckinghamshire v. Drury*, 2 Eden, 60; *Wilmot's Opinions*, p. 177; *McCartee v. Teller*, 2 Paige, 511.

(*t*) Previous to *Milner v. Harewood*, 18 Ves. 259, the weight of authority seemed to be in favor of her having such power. See *Atherley's Treatise on Marriage Settlements*, pp. 28 to 45. But in that case Lord *Eldon* held that she was not so bound by such conveyance or agreement to convey as that she might not avoid it on coming of age.

come within the reason of the rule which makes valid the contracts of an infant for necessities. Of course such a settlement would be within the power of chancery, for correction or avoidance, on the ground of fraud, mistake, or undue influence, and any injurious effect would be prevented. And the court would always pay due regard to the youth and immaturity of the infant wife. But to say that a young woman may marry, but, because she is an infant, cannot use valid precautions to secure her property against waste, and for her own benefit, would give an effect to her legal incapacity entirely opposed to the principle that the disability of an infant is a privilege allowed as a shield and a protection, not as a burden and an injury. It has therefore been held that such settlement is, at all events, only voidable, and that no one but herself can avoid it, and she need not; but may affirm or avoid it when of full age. The question then occurs, whether she can so disaffirm it after majority, if still married; and it has been said that the preponderance of opinion is that she cannot. (u) So whether a male infant may bind himself irrevocably by a marriage settlement of his own estate is not quite certain. (v) It is not, however, easy to find any very good reason which would draw a distinction between the sexes in this particular, and make such settlement by a male infant absolutely binding, and leave that by a female voidable by her at her majority. But we consider this whole subject open for further adjudication.

SECTION IX.

INFANT'S LIABILITY WITH RESPECT TO FIXED PROPERTY
ACQUIRED BY HIS CONTRACT.

It is of importance to know how the ordinary principles governing the contracts of infants are applied to the case

(u) *Temple v. Hawley*, 1 Sandf. Ch. 153.

(v) In *Slocombe v. Glubb*, 2 Bro. C. C. 545, it seems to be the doctrine that a male infant may bar himself by covenants before marriage of his estate by courtesy, and of all right in or to his

wife's personal property. And that both male and female infants can settle their personal estate before marriage, definitively. See *Strickland v. Coker*, 2 Ch. Cas. 211; and *Warburton v. Lytton*, cited in *Lytton v. Lytton*, 4 Bro. C. C. 441.

where an interest in property, of a *fixed and permanent nature*, is vested in an infant by means of his contract. Are the duties attendant upon the occupation of fixed property separated therefrom when the occupier is within the privilege * of minority? Where the interest devolves by direct operation of law, (as upon marriage, or by descent,) it is clear that the duty is received along with it — *transit terra cum onere*. (w) This fundamental maxim thus undergoes no *general* relaxation in favor of infants; its operation is only affected, if at all, when that other maxim, that an infant's contract shall never be his burden, comes in conflict with it. The question arising here is undoubtedly one of no little difficulty; but it has been so determined as to reconcile the two principles without impairing either of them. It is held that if one under age take a lease, and enter, and continue in possession after claim of the rent, he, like any other person, (and by the same *process* as any other person,) (x) may be compelled to pay the rent he has contracted to pay. (y) Yet he may, if he choose, disclaim at any time, and thereby exonerate himself; (z) or, at least, he may disclaim at any time before the rent-day comes, and have relief from liability for the past occupation. (a) No necessity obliges him to put off his disclaimer until his majority; for it is common learning that an infant may avoid matters *in fait*, either within age, or at full age, (b) but matters *of record* (for the reason that when such come in question, his nonage is to be ascertained by inspection of the court, and not by the country,) must be avoided during his minority, and not afterwards. Yet when it is said he may avoid during minority, what is to be understood is rather a suspension than an avoidance, — an avoidance, as it were, only *de bene esse*. Upon arriving at full age he may disaffirm that disaffirmance, and revive the original

(w) *Leeds & Thirsk Railway v. Fearnley*, 4 Exch. 26.

(x) *Per Parke, B., Newry & Enniskillen Railway v. Coombe*, 3 Exch. 569.

(y) *Newton, C. J., Bottiller v. Newport*, 21 H. 6, 31 B., cited and approved by *Parke, B.*, in *North-Western Railway v. McMichael*, 5 Exch. 126; *Ket-*

ley's case, Brownl. 120; S. C., under various names, Cro. Jac. 320, 2 Bulst. 69, Rol. Abr. Enfants, K.

(z) *North-Western Railway v. McMichael*, 5 Exch. 125.

(a) *Ketsey's case*, Cro. Jac. 320; 1 Platt on Leases, 528, 529.

(b) Co. Litt. 380 b; Bac. Abr. Infancy and Age, (I.) 5.

contract. (c) In this case the debt incurred by *his former occupation under the lease, and the recovery of which he had prevented by disavowing, also revives. Where an interest vests in the infant, (as it appears it does in all cases where he accepts a lease or other conveyance of land, or an assignment of a share in permanent stock,) no express ratification on coming of age is requisite. The interest, being vested, continues until divested by repudiation, which may be by parol; and his acquiescence after majority will be taken, after a reasonable time, as a waiver of his right to disclaim, and an adoption, at mature age, of the act of his infancy. (d) It seems (though the point is still unsettled,) that the fact that the rent reserved upon a lease made to an infant is greater than the land is worth, in no respect alters the case; although the contract is now manifestly an injurious one. (e)

Even if shares in a railway corporation, or other Public Company holding land, are personal property, (f) the holders of such shares, since they acquire a vested interest of a permanent nature, fill a position analogous in this respect to that of occupiers of real estate; and the infant purchaser of a share in such a corporation incurs a liability similar to that of an infant lessee. (g) Thus the simple plea of infancy is

(c) *North-Western Railway v. McMichael*, 5 Exch. 114, 127; with which compare *Newry & Enniskillen Railway v. Coombe*, 3 Exch. 572, 575, 578. In the former case the law is thus summarily stated in the judgment of the court:—"It seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority."—See *Bool v. Mix*, 17 Wend. 119, 132, per *Bronson, J.*

(d) *Bac. Abr. Infancy and Age*, (I.) 8; *Com. Dig. Enfants*, (C. 6); *Evelyn v. Chichester*, 3 Burr. 1717; *Lawson v. Lovejoy*, 8 Greenl. 405; *Robbins v.*

Eaton, 10 New Hamp. 562. *Holmes v. Blogg*, 8 Taunt. 39, 40, per *Dallas, J.*

(e) *North-Western Railway v. McMichael*, 5 Exch. 114.

(f) *Bligh v. Brent*, 2 Y. & Coll. 268; *Bradley v. Holdsworth*, 3 M. & W. 422, 424.

(g) In *Newry & Enniskillen Railway v. Coombe*, 3 Exch. 577, where the point was discussed, *Rolfe, B.*, indeed, said:—"I must say I doubt whether the doctrine as to a lease granted to an infant who enjoys the land demised would apply here, because this liability rests entirely in contract, and there is no possession of any thing; all that the party gets is a right to a portion of the profits of the undertaking." But see *Leeds & Thirsk Railway v. Fearnley*, 4 Exch. 26, and especially the judgment of the court as given by *Baron Parke* in *North-Western Railway v. McMichael*, 5 Exch. 123.

no defence to an action for calls. (h) What limits are to be * set to the analogy is undetermined. It cannot be said that the cases which have as yet been adjudicated are authority for extending it to other than stock based, like railway stock, in some measure upon the possession of land.

There is no principle of law (though such has sometimes been supposed to exist,) placing infants on the same footing as other persons whenever they enter into contracts which owe their validity, and the means of their enforcement, to *statutes*. In all statutes containing general words there is an implied, or virtual, exception in favor of persons whose disability the common law recognizes. (i) Thus where a company is incorporated by statute, and by a general clause all shareholders are subjected to certain liabilities, and enjoined certain duties; here the same abatement of the rigor of the provision is to be made with regard to infants, lunatics, and feme coverts, which the common law would make in applying a common-law rule. (j) The case of an infant whose interest in his land or stock is acquired by marriage or descent is (as we have seen,) quite different; for his lia-

(h) *Birkenhead, Lancashire, & Cheshire Railway v. Pilcher*, 5 Exch. 121.

(i) *Stowel v. Zouch*, Plowd. 364.

(j) In the *Cork & Bandon Railway v. Cazenove*, 10 Q. B. 935, two of the judges, Lord *Denman* and *Patteson*, J., expressed the opinion that since by the statute a shareholder was liable to the company for calls in his character of shareholder, the fact of infancy made no difference. The Court of Exchequer, which had previously refused assent to this doctrine, (see *Newry Railway v. Coombe*, 3 Exch. 565, and *Leeds Railway v. Fearnley*, 4 Exch. 26, 32,) thus observed upon it in the *North-Western Railway v. McMichael*, 5 Exch. 124: "We cannot say that we concur in the opinion of the Court of Queen's Bench, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that all shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the company, for calls, and also attached

the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favor of infants and lunatics in statutes containing general words, (*Stowel v. Lord Zouch*, Plowd. 364,) though that depends, of course, on the intent of the legislature in each case, (see *Wilmot's Notes of Opinions and Judgments*, p. 194, *The Earl of Buckinghamshire v. Drury*,) and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due."

bility is cast upon him by direct operation of law. (*k*) So * where a minor is held to service in the navy by force of a statute; (*l*) it is not the contract of enlistment which binds him, but the statutory *duty*. In all cases, "the only criterion is whether the liability is derived from contract." (*m*) If it be derived from contract the common-law exceptions apply to it; otherwise, not.

Respecting the manner of pleading the defence of infancy in cases where a liability is charged on account of the occupation of land, or the possession of stock, and of replying to that defence, the following conclusions may be drawn from recent decisions in England. First, Where a *primâ facie* liability appears in consequence of such holding of land or stock, the simple plea of infancy is not sufficient; the defendant must also aver that the interest on account of which he is charged came to him *by contract* and that he has *disaffirmed* that contract, (*n*) and if the disaffirmance be after he arrived of age he must aver that it was within a reasonable time after becoming of age. (*nn*) Second, If upon the simple plea of infancy being put in, the plaintiff take issue thereon, and the defendant obtain a verdict, the plaintiff is entitled to judgment *non obstante veredicto*. (*o*) Third, Where infancy, the contract, and the disaffirmance, are all pleaded, it is a good bar; and if the defendant has, upon coming of age, reaffirmed the contract, it is for the plaintiff to allege this fact in his replication. (*p*) Fourth, Supposing the law to be (which, however, it seems it is not,) that an infant occupying under a lease, wherein exorbitant rent is reserved, may defend against the recovery of such rent, *without giving up possession*, his plea, in addition to the other requisites, must distinctly show that at the time of pleading it he is still a minor. (*q*)

(*k*) *Parke, B., Newry & Enniskillen Railway v. Coombe*, 3 Exch. 574; *Leeds & Thirsk Railway v. Fearnley*, 4 Exch. 26.

(*l*) See *United States v. Bainbridge*, 1 Mason, 71.

(*m*) *Parke, B., Newry & Enniskillen Railway v. Coombe*, 3 Exch. 569.

(*n*) *Leeds and Thirsk Railway v. Fearnley*, 4 Exch. 26; *Cork & Bandon*

Railway v. Cazenove, 10 Q. B. 935, 11 Jur. 802.

(*nn*) *Dublin & Wicklow Railway Co. v. Black*, 16 E. L. & E. 556.

(*o*) *Birkenhead, Lancashire, & Cheshire Railway v. Pilcher*, 5 Exch. 121.

(*p*) *The Newry & Enniskillen Railway v. Coombe*, 3 Exch. 565.

(*q*) *North-Western Railway v. McMichael*, 5 Exch. 128.

CHAPTER XVII.

OF THE CONTRACTS OF MARRIED WOMEN.

Sect. I.—*Of the General Effect of Marriage on the Rights of the Parties.*

AT common law the disability of a married woman is almost entire. Her personal existence is merged for most purposes in that of her husband. This was not so among the Anglo-Saxons, nor with the earlier Teutonic races; and must be explained as one of the effects of the feudal system. It was a principal object of that system to make the whole strength of the state available as a military force; and to this purpose was sacrificed much of the consideration and respect which had been formerly paid by the German tribes to woman and her rights of property, and which had distinguished these tribes from the nations of Rome, Greece, and the East. As the married woman could not be a soldier, she was permitted to have but imperfect and qualified rights of property, because property was then bound to the state, and made the means of supplying it with an armed force. It is possible that the Teutonic respect for woman was intensified into the extravagance of chivalry, as a kind of compensation. All was done for her that could be done, in manners and in social usages; because in law, and in reference to rights of property, so little was allowed. Dower was carefully secured to her; but the exercise of her own free will over her property was forbidden. But the influence of the feudal system is broken; very much in England, and far more here. And among the effects of this decay of a system in which many of the principles and forms of our law originated, we count the changes which have been made and are now making in the law which defines the position and the

rights of the married woman. This law is in fact, at this moment, in a transition state in this country. It seems to be everywhere conceded that the old rules were oppressive and unjust, and certainly not in conformity with the existing temper or condition of society. Almost everywhere changes are made, or attempted; and the necessity of change is not denied. But in some parts of our country the slow and gradual progress of these changes indicates a belief that there is much need of caution, in order to improve and liberalize the marital relation, without inflicting upon it great injury. We know that in those States in which the greatest changes have been made, and still greater are desired by some persons, there are those who think mischief has already been caused, and that a brief experience will prove the inconvenience and danger of permitting husband and wife to possess interests and properties and powers, altogether, or in a great degree, independent and equal. The tendency of this would seem to be, necessarily, to make them bargainers with each other; and as watchful against each other, as careful for good security, as strict in making terms, and in compelling an exact performance of promises or conditions, and as prompt to seek in litigation a remedy for supposed wrong, as seller and buyer, lender and borrower, usually are; and as these parties may be, more properly and safely, than husband and wife.

We will first consider the effect of marriage upon the contracts made by the woman before her marriage, and then her contracts made after marriage.

SECTION II.

OF THE CONTRACTS OF A MARRIED WOMAN MADE BEFORE MARRIAGE.

The contract of a married woman made before her marriage enures to the benefit of her husband; but does not vest in him absolutely. It is a chose in action, which he may

reduce to his own possession during her life. If he does not *so reduce it to his possession, and dies, she surviving him, it becomes again absolutely hers. (r) If she dies before he has reduced it to possession, he surviving, he may enforce the contract as her administrator, for his own benefit. (s) And it has been said that if he gets possession of her choses in action after her death, without suit, they are his, by a title as perfect as if he had received letters of administration. (t) And if administration be necessary, and the husband dies before having letters of administration, the right to take them goes to his personal representatives; and if another party becomes administrator, he will be regarded as a trustee for the husband or his personal representatives. (u) He may reduce such chose in action to his possession by receiving the money or other benefit due from it, or by a new contract, with the debtor in substitution for the wife's chose in action, or by recovering a judgment on the contract. (v) Generally, in all cases where the right of action would survive to the

(r) Co. Litt. 351, b; *Obrian v. Ram*, 3 Mod. 186; *Estate of Kintzinger*, 2 Ashmead, 455; *Legg v. Legg*, 8 Mass. 99; *Glasgow v. Sands*, 3 Gill & Johns. 96; *Stephens v. Beal*, 4 Georgia, 319; *Killcrease v. Killcrease*, 7 How. (Miss.) 311; *Rogers v. Bumpass*, 4 Ired. Eq. 385; *Sayre v. Flournoy*, 3 Kelly, 541.

(s) 1 Rol. Abr. 910; *Elliot v. Collier*, 3 Atk. 526, 1 Ves. Sen. 15, 1 Wils. 168; *Donnington v. Mitchell*, 1 Green's Ch. 243. He holds the proceeds, however, as assets for the payment of her debts contracted before marriage. — *Heard v. Stamford*, 3 P. Wms. 409; *Cas. temp. Talbot*, 173; 2 Kent, Com. 135; *Blennerhassett v. Monsell*, 19 Law Times Rep. 36.

(t) *Whitaker v. Whitaker*, 6 Johns. 112. We cannot but entertain some doubts of this. But see *Lowry v. Houston*, 3 How. (Miss.) 394; *Scott v. James*, 3 Id. 307; *Wade v. Grimes*, 7 Id. 425.

(u) And so if her husband having been appointed administrator, die before the estate is all administered, his executor or administrator is entitled to be administrator *de bonis non*, in preference to her next of kin. *Donnington v. Mitchell*, 1 Green, Ch. R. 243; *Hendren v. Colgin*, 4 Munf. 231.

(v) It seems that any act on the part of the husband, which clearly shows an intention to make the wife's chose in action his own, as mortgaging, releasing, taking a new security, procuring a judgment on it, appointing another as agent to collect the money, who actually collects it, &c., is a sufficient reduction to possession, and bars the wife's right of survivorship. But mere receipt of interest on the wife's chose in action is not a reduction to possession. *Hart v. Stephens*, 6 Q. B. 937. Nor is the mere fact that he joined with her, in giving a receipt for the principal, sufficient evidence of a reduction to possession by the husband. *Timbers v. Katz*, 6 Watts & Serg. 290. As to the question whether an assignment of a wife's chose in action operates as a reduction into possession so as to bar her right of survivorship, see 2 Kent, Com. 138, and notes. A note given to a wife during coverture is a chose in action, which the husband must reduce to possession, and not a personal chattel which vests absolutely in him. *Gaters v. Madeley*, 6 M. & W. 423; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 864.

wife, the husband and wife must join in an action therefor. (*w*)

SECTION III.

OF THE CONTRACT OF A MARRIED WOMAN MADE DURING THE MARRIAGE.

By the rules of the common law, a married woman has no power to bind herself by contract, or to acquire to herself and for her exclusive benefit any right, by a contract made with her. If she receive money or property by gift to herself or in payment for her services, and lend it, her husband and not she has the right to recover it; and so if she sell any thing, her husband has the right to recover the price. He may claim the earnings of her personal labor, and only where she alone is the meritorious cause of the debt due can she be joined in an action for it. In general, whatever she earns she earns as his servant, and for him; for in law, her time and her labor, as well as her money, are his property. (*x*)

If A. enters into a contract with the wife of B., not knowing her marriage, and she having no authority to bind B., and not professing to act for him, the wife is not bound, neither is B. liable upon such contract. (*y*) But whether B.,

(*w*) *Morse v. Earl*, 13 Wend. 271; *Ramsay v. George*, 1 M. & S. 176; *Hoy v. Rogers*, 4 Monroe, 225; *Milner v. Milnes*, 3 T. R. 631.

(*x*) See *Legg v. Legg*, 8 Mass. 99; *Howes v. Bigelow*, 13 Mass. 384; *Winslow v. Crocker*, 17 Maine, 29; *Hoskins v. Miller*, 2 Dev. 360; *Ilyde v. Stone*, 9 Cow. 230; *Morgan v. Thames Bank*, 14 Conn. 99; *Matter of Grant*, 2 Story, 312; *Hawkins v. Craig*, 6 Monroe, 257. And notwithstanding the husband lives apart from his wife, and in a state of continued adultery, his right to her personal property is still the same, so long as the relation of husband and wife continues. *Russell v. Brooks*, 7 Pick. 65; *Turtle v. Muncy*, 2 J. J. Marsh. 82; including her earnings both before and after marriage. *Glover v. Proprietors of Drury Lane*, 2 Chitty, 117; *Washburn v. Hale*, 10 Pick. 429; *Prescott v.*

Brown, 23 Maine, 305. In *Messenger v. Clark*, 5 Exch. 388, it was held that a husband is entitled to the money which his wife saves out of a weekly allowance given by him for her support, they living separate by agreement. It should be noted, however, that *Rolfe, B.*, puts the case on the ground that the wife had invested her savings in stock, (which stock she afterwards sold and gave away the proceeds,) and he held that although the money might have been hers to dispose of as she pleased, yet when she bought a specific chattel with a part of it, that chattel became the husband's.

(*y*) In *Smith v. Plomer*, 15 East, 607, it was held that a tradesman supplying a married woman living apart from her husband with furniture upon hire, does not thereby divest himself of the present right of property in such goods,

who may certainly repudiate the contract, can elect to adopt it, and enforce it as his own against A., may well be doubted. Upon principle we should say he could not, because there is a total want of reciprocity or mutuality. We may add that such a case would perhaps fall within the rule, that no act is capable of ratification by the principal which was not performed by the agent *as agent*, and in behalf of the principal. (z)

The wife may be the agent of the husband, and in that character make contracts which bind him; and this agency need not be expressed, but is raised by the law from a variety of circumstances. Thus, the purpose and comfort of married and domestic life would be defeated or obstructed if the wife had not a general authority to hire servants, or to purchase

inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution, at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. Lord *Ellenborough*, C. J. "This case has been presented during parts of the argument in different points of view from what it appeared in at the trial. In order to maintain trover, the plaintiff must have a present right of property in the goods; the first question, therefore is, whether the plaintiff had put the right of property out of him by a valid contract for the hire of the goods with Mrs. East? If the contract were for a year it would put the property out of him for that time; or if according to Mrs. East's evidence, the hiring were only general, without determining either price or time, it would operate as a contract, for a reasonable price, so long as both parties pleased; and still the property would be out of him for the time, if it were a valid contract. That brings it to the question whether Mrs. East, being a married woman, could make a valid contract for the hire of the plaintiff's goods. Now a contract to be valid must bind both parties; but she

being married, it could not bind her. It is said, however, that it would bind her husband, being for necessities for her use; but I know of no case where a husband has been held liable upon a contract of this sort made by his wife living apart from him, as for necessities; and no such case was made before the jury. Then has he confirmed the contract? There is no such evidence. The case, therefore, stands upon her own contract unconfirmed, which is liable to the infirmity of her being a married woman. It was argued, on the other hand, that supposing the contract was good, the notice given by the plaintiff to the sheriff's officer would have determined it; but to that I cannot accede; for to determine a contract, which is determinable upon notice, the notice should be brought home to the other contracting party; and it is not enough that it should be given to one acting adversely under some supposed derivative title in the law from that party. The notice, therefore, which was given to the sheriff's officer, would not alter the case. The conclusion is, that this action lies, because the plaintiff had the present right of property in him at the time, inasmuch as the married woman, to whom he sent the goods, was not capable of contracting with him for the hire, so as to take the property out of him."

(z) See "Agents" *ante*: Sec. III., note, (u)

such articles as are necessary for the use of the family; and the necessity is not to be a strict one, but includes whatever things are unquestionably proper to be used in the family, and suited to the manner of life which the husband authorizes; and this even after her adultery, if they have not separated. (a) And therefore the law clothes her with this authority. (b) So, whatever she purchases for herself, the husband is liable for, provided it be such in quality, and no more in quantity, than is suitable for the station and means of the husband, and the manner in which he permits her to live. But beyond this she has no such authority; her contracts for other things are wholly void. Thus, an agreement by a wife for the sale of her real estate, with the assent of her husband, and for a valuable consideration, is said to be void in law; and equity has refused to enforce it. (c)

In every case it is a question for the jury, under the instruction of the court, whether articles supplied to the wife, and for which it is sought to make the husband liable on his implied authority to her, are or are not necessities in this sense, (d) and the husband may show that the articles are not necessities by proof that the wife had previously sufficiently supplied herself elsewhere. (dd)

An important fact may be, the possession by the wife of a separate income or other distinct means of her own; and it

(a) *Robinson v. Greinold*, 1 Salk. 119, 6 Mod. 171; Bac. Abr. Bar. & F. (H.)

(b) The wife is *prima facie* the husband's agent in managing the affairs of his household. *Pickering v. Pickering*, 6 New Hamp. 124; *Mackinley v. McGregor*, 3 Whart. 369; *Felker v. Emerson*, 16 Verm. 653. But not to lend his property. *Green v. Sperry*, 16 Verm. 390, although where the husband was absent from home, and she let out for hire her husband's horses, it was presumed she had authority so to do: *Church v. Landers*, 10 Wend. 79. But whether the husband is at home or abroad, the wife is not presumed to be his agent generally, or to be intrusted with any other authority than it is usual and customary to confer upon the wife. *Benjamin v. Benjamin*, 15 Conn. 347; *Sawyer v. Cutting*, 23 Verm. 486; *Leeds v. Vail*, 15 Penn. 184. And an

innkeeper's wife has no authority during her husband's absence to board or lodge his guests at less than the usual rates. *Webster v. McGinnis*, 5 Binn. 235. And the wife cannot appear and manage a cause at *nisi prius* for her husband, although he is at the time in custody and cannot appear himself. *Cobbett v. Hudson*, 10 E. L. & E. 318.

(c) *Lane v. McKeen*, 15 Maine, 304.

(d) *Etherington v. Parrot*, Salk. 118; *McCutchen v. McGahay*, 11 Johns. 281; *Clifford v. Laton*, 3 C. & P. 15; *Holt v. Brien*, 4 B. & Ald. 252; *Seaton v. Benedict*, 5 Bing. 28; *Montague v. Espinasse*, 1 C. & P. 356; *Spreadbury v. Chapman*, 8 C. & P. 371; *Atkins v. Curwood*, 7 C. & P. 756; *Waithman v. Wakefield*, 1 Camp. 120; *Furlong v. Hysom*, 35 Maine, 333.

(dd) *Renaux v. Teakle*, 20 E. L. & E. 345.

may be necessary to ascertain whether the tradesman supplying her dealt with her as on her own account, making charges to her alone, and receiving payment from time to time from her alone; for such facts would go far to show that he dealt with the wife on her own credit, and not on her husband's. (e)

*But if the articles be more or better than are necessary for the wife, still the husband may be held, not upon his authority as implied by the law, but upon sufficient evidence of his express authority or assent; and for this purpose comparatively slight evidence is sufficient; and the mere fact that he saw and knew that she possessed and used the property, or even that she had ordered it and made no objection, may be enough for this purpose. (f) For so long as the husband lives with his wife, he is liable to any extent for goods which he distinctly permits her to purchase. That the husband may withhold his authority, and is always saved from liability by express notice and prohibition, is perhaps more clear by the earlier authorities than by the later. It was long since decided that if the wife lives with the husband, and he prohibits a tradesman from supplying her with articles of dress, he cannot be made liable for them, because, in the language of Lord Hale, "it shall not be left to a jury to dress my wife

(e) It is always a question of fact for the jury whether the tradesman gives credit to the wife for articles delivered to her, and if the credit is once given to her, the husband will not be liable, although the articles may be necessary, and although the wife lives with him, and he sees her wear them, without objection. *Bently v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22; *Stammers v. Macomb*, 2 Wend. 454; *Moses v. Fogartie*, 2 Hill, So. Car. 335; *Shelton v. Pendleton*, 18 Conn. 417; for the law does not allow a person who has once given credit to A., knowing all the facts, afterwards to shift his claim and charge B. *Leggat v. Reed*, 1 C. & P. 16. And wherever a married woman lives apart from her husband, having a separate estate and maintenance secured to her, there may be good ground to hold, that all her debts contracted for such maintenance, and in the course of her dealings with tradesmen, are understood

by both parties to be upon the credit of her separate funds for maintenance. 2 Story on Eq. Jur. § 1401. See also *Owens v. Dickinson*, 1 Craig & Ph. 48; *Murray v. Barlee*, 3 My. & Keen, 209; *N. A. Coal Co. v. Dyett*, 7 Paige, 9; *Gardner v. Gardner*, Id. 112.

(f) *Waithman v. Wakefield*, 1 Camp. 120. The mere fact that the husband sees the wife wearing the goods does not vary the case, if it be shown that he disapproved of the conduct of the wife in ordering them. *Atkins v. Curwood*, 7 C. & P. 756. And where no express authority is shown, the extravagant nature of the wife's order is always proper to be taken into consideration by the jury, as showing that the wife had no such authority. *Lane v. Ironmonger*, 13 M. & W. 368; *Freestone v. Butcher*, 9 C. & P. 647; *Montague v. Benedict*, 3 B. & Cr. 631; *Seaton v. Benedict*, 5 Bing. 28.

in what apparel they think proper." (g) And this doctrine is maintained by many cases, and the rule to be gathered from them would seem to be that the *implied* authority of the husband may always be rebutted by proof of express prohibition. We cannot but think it certain, however, that *this rule would be greatly modified, at least in this country, under circumstances which distinctly required such modification. As, for instance, suppose the husband to be rich and penurious, and that he gave his wife garments enough to prevent her suffering from cold, but only of such coarse fabric or materials that she could not wear them in the street; or that from bad temper or cruelty he gave her no clothing, so that for decency's sake she was obliged to remain always in her chamber, and even there suffered from cold; we cannot doubt that the husband would be held liable in such cases, the law resting his liability, if necessary, upon an absolute presumption of his authority; as has been held in the case of his turning her out of doors without her fault. And the reason and justice of the rule would be fully satisfied if the husband, living with his wife, were held answerable for necessities supplied to her, with or without notice of prohibition; but where there was express prohibition, then the jury should be instructed that the word "necessaries" should be construed very strictly. It is said, "the law will not presume so much ill as that a husband should not provide for his wife's necessities." (h) This should not be presumed; but when it is proved, the law will not do so much ill as to leave her without necessities. The later authorities seem indeed to change, and as we think materially for the better, the ground upon which the liability of the husband for necessities furnished to the wife has hitherto rested. Generally, at least, it has been put upon her agency and his authority. Undoubtedly this has been stretched very far, and authority to contract for the husband sometimes implied from circumstances which not only suggest no rational probability

(g) *Manby v. Scott*, 1 Sid. 122; *Bac. Abr. Bar. & F. (H)*; *Etherington v. Bolton v. Prentice*, Str. 1214; *Renaux v. Teakle*, 20 E. L. & E. 345.
Parrot, 2 Ld. Raym. 1006, 1 Salk. 118; (h) Lord *Hale*, in *Manby v. Scott*, 1 Sid. 109.

of any such authority, but seem to be strongly opposed to this supposition; it sometimes appears to be a legal supposition, not only without fact, but opposed to fact. It seems, indeed, absurd to say that a man who has driven his wife from his house and his presence, and manifested by extreme cruelty his utter hatred of her, was all the time constituting her his agent, and investing her with authority to bind him and his *property. And if we suppose the case, where a wife perfectly incapacitated by infirmity of body or mind from making any contract at all, is supplied with necessities by one who finds her driven from home and ready to perish, and who now comes to her husband for indemnity, we cannot doubt that he would recover. But the proposition would seem too absurd even to take its place among the fictions of the law, that the wife, when she received this aid, promised in the husband's name that he would pay for it, and that he had given her a sufficient authority to make this promise for him. For these and other reasons courts now show a tendency to rest the responsibility of the husband for necessities supplied to the wife, on the duty which grows out of the marital relation. He is her husband; he is the stronger, she the weaker; all that she has is his; the act of marriage destroys her capacity to pay for a loaf with her own money; and as all she then possesses, and all she may afterwards acquire, are his during life and marriage, upon him must rest, with equal fullness, if the law would not be the absolute opposite of justice, the duty of maintaining her and supplying all her wants according to his ability. And we think this plain rule of common sense and common morality is becoming a rule of the common law. (i)

(i) In *Read v. Legard*, 4 E. L. & E. 523, the husband was a lunatic, confined in an asylum as dangerous; and the plaintiff had supplied the wife with necessities. *Hill*, of counsel, says, *arguendo*:—"Not only has it never been decided judicially that by the mere fact of marriage a man confers on his wife an irrevocable authority to bind his credit, but every thing tends to show that her right so to do is derived from some act, real or supposed, of the husband,

done after the marriage, and which he must be in a condition to persist in or revoke." *Pollock*, C. B., said:—"This rule must be discharged. The question raised by it is, whether an action can be maintained against a defendant, who has been a lunatic, for things supplied for the necessary support of his wife during the lunacy. It appears to me that the defendant is liable in such an action. The action is founded on this, that the defendant has taken on him a

If a married woman carries on trade, and her husband lives with her and receives the profits, or they are applied to the maintenance of the family, the law presumes that she was his agent in this trade, and had his authority to make the necessary purchases. (*j*) So an authority may be presumed from habitual acts of agency, or from confirmation, which may be express or implied, as where a wife was in the habit of drawing, indorsing, accepting, or paying bills and notes for her husband, and this he knew and sanctioned,

duty — having contracted marriage with the person sustained by the plaintiff, he has thereby become in point of law liable for her maintenance, and if he fails to provide for that maintenance, except under certain circumstances which justify him in withholding it, she has authority to pledge his credit to procure it. It may be true as stated by Mr. Hill, that no case has yet arisen in which this precise point was brought before any court; but, on the other hand, none of the *dicta* that occur in any of the cases cited furnish a clew to decide the present one adversely to the plaintiff." *Alderson, B.*, in the course of the trial, had said: — "It is a monstrous proposition, that a man who drives a woman out of doors, who hates, who abominates her, actually gives her authority to make contracts for him." He and *Platt*, and *Martin, BB.*, agreed with *Pollock, C. B.* *Martin, B.*, said: — "My brother Alderson has stated the real truth respecting the obligation of the defendant and the principle of his liability; namely, that by contracting the relation of marriage, a husband takes on him the duty of supplying his wife with necessities; and if he does not perform that duty, either through his own fault, or in consequence of a misfortune of this kind, the wife has in consequence of that relation a right to provide herself with them, and the husband is responsible for them. And although in the declaration the debt sued on is alleged to be the debt of the defendant contracted at his request, the truth is that it is the wife who contracts the debt, while the husband is responsible for it." See also *Montague v. Benedict*, 3 B. & Cr. 631, and *Seaton v. Benedict*, 5 Bing. 28. (In these very interesting cases on the liability of the

husband for goods furnished to the wife, Mr. Smith, in his work on Contracts, p. 286, says the name of the defendant is fictitious, and borrowed from Shakspeare's *Much Ado about Nothing*; the defendant being actually "a highly respectable professional gentleman," whose name is not given.) A similar doctrine was laid down in *Shaw v. Thompson*, 16 Pick. 198, (1834.) *Shaw, C. J.*, in that case says: — "By law a husband is entitled to all the personal property of the wife, to all her earnings and acquisitions, and to the measure of her real estate; it also throws on him the obligation to support and maintain her." And in *Sykes v. Halstead*, 1 Sandf. Sup. Ct. 483, it was held, that where a husband turns his wife away, or compels her to go by ill-treatment, and refuses to provide for her, he gives her a credit with the whole community, although it be expressly forbidden by him; and she has a right to be supported by him.

(*j*) *Petty v. Anderson*, 2 C. & P. 38; *Clifford v. Burton*, 1 Bing. 199. — But in *Smallpiece v. Dawes*, 7 C. & P. 40, where A., who kept a fruit shop in London, became a bankrupt in 1824, but did not surrender to his commission, and from that time to 1833 the business was carried on by his wife, to whom fruit was supplied, between 1828 and 1832, to an amount exceeding £266, and evidence was given to show that A. was seen in London a few times between 1824 and 1833, and was arrested at the shop in 1833, and that he attended the marriage of his two daughters at Mary-le-bone church; it was held that proof of these facts was not sufficient to go to the jury to show that A.'s wife acted as his agent, so as to charge him with the price of the fruit.

his authority to her will be presumed. (*k*) Or if such bills *and notes are usually a part of a certain business which is intrusted to the wife by the husband, he would undoubtedly be held liable for them. Whether a married woman can borrow money, even for necessities, and her husband be held liable on his implied authority, seems not to be settled. (*l*) If the lender can show that the money was used by the husband, then he can hold him.

When the cohabitation with the husband ceases, and they live separately, then a new state of things arises, and with it new rules of law. The wife separates from her husband, either by his fault, or by her own, or by mutual consent and agreement. In the first case she carries with her all her rights to necessities, and he who supplies them to her may hold her husband liable for their price. (*m*) And we deem it to be the same thing in law, as

(*k*) *Cotes v. Davis*, 1 Camp, 485; *Barlow v. Bishop*, 1 East, 432; *Prestwick v. Marshall*, 7 Bing. 565. His authority to her to make notes in his name cannot, however, be inferred from the mere fact that he knew she was carrying on business, and that she gave the note in the course of such business; and on a note so given the husband is not liable even to a *bonâ fide* indorsee. *Reakert v. Sanford*, 5 Watts & Serg. 164. — Whenever the husband authorizes the wife to execute notes in his name, they must purport on their face to be made in his behalf, or by her *as agent*, or he will not be bound. *Minard v. Mead*, 7 Wend. 68. — But in the late case of *Lindus v. Bradwell*, 5 C.B. 583, where a bill of exchange addressed to "William B." was accepted by his wife, by writing her own name, "Mary B." upon the back, which was presented to the husband after it became due, who said he knew all about it, that it was for a milliner's bill, and that he would pay it shortly, he was held liable as acceptor, although he had not expressly authorized his wife so to accept the bill.

(*l*) At law a husband is not liable for money lent to the wife, unless his request be averred and proved. *Stone v. Macnair*, 7 Taunt. 432; *Stephenson v. Hardy*, 3 Wils. 388; *Walker v. Simpson*, 7 Watts & Serg. 83; *Grendell v.*

Godmond, 5 Ad. & Ell. 755; *Earle v. Peale*, 1 Salk. 387; *Darby v. Boucher*, Id. 279. In equity, however, the lender will be allowed to stand in place of the tradesmen, and to have satisfaction as far as they could, had they been plaintiffs. *Harris v. Lee*, 1 P. Wms. 482, Prec. in Chanc. 502; *Walker v. Simpson*, *supra*; *Marlow v. Pitfield*, 1 P. Wms. 558. See *May v. Skey*, 16 Simons, 588, 18 Law Jour. 308. And where money was advanced to the wife living with her husband, and he after the wife's decease promised to repay the same, "when convenient," but said he was not privy to the loan, it was held that there was evidence to go to the jury that the wife had borrowed the money with the sanction of her husband, or that he ratified the act, and the plaintiff had a verdict. *West v. Wheeler*, 2 C. & K. 714.

(*m*) *Bolton v. Prentice*, 2 Strange, 1214; *Harris v. Morris*, 4 Esp. 41; *Rawlins v. Vandyke*, 3 Esp. 251; *Hodges v. Hodges*, 1 Esp. 441; *Aldis v. Chapman*, 1 Selw. N. P. 281; *McCutchen v. McGahay*, 11 Johns. 281; *Houlston v. Smyth*, 3 Bing. 127; *Howard v. Whetstone*, 10 Ohio. 365; *Emmett v. Norton*, 8 C. & P. 506; *Clement v. Mattison*, 3 Richardson, 93; *Fredd v. Eves*, 4 Harring. 385. And if a wife is justified in leaving her husband, a request on his part that she will re-

well as in reason, whether he actually expels her from his *house without her fault, or compels her to leave his house by cruelty to her, or by his misconduct in it, as by introducing a prostitute into it. (n) The *dictum* of Lord Eldon, that "where a man turns his wife out of doors, he sends with her credit for her reasonable expenses," is undoubtedly law. (o)

Where husband and wife live together, there is a presumption of law arising from cohabitation, that the husband assents to contracts made by the wife for the supply of articles suitable to their station, means, and way of life. (p) But when this cohabitation ceases, then, by the English authorities, the presumption of law is against his assent; and the husband is not liable, unless such presumption be rebutted by showing his authority from the nature and circumstances of the separation, or the conduct of the husband, or the condition of the wife, and the nature of the articles

turn will not determine his liability for necessities supplied to her during the separation. *Emery v. Emery*, 1 Younge & Jervis, 501. Where, however, the person supplying the wife with necessities relies upon her husband's ill-treatment as good cause for her leaving him, he must show affirmatively that the separation took place in consequence of the husband's misconduct. It is not enough to prove that there were quarrels and personal conflicts *between* them, unless it be shown that the husband was the offending party. *Blowers v. Sturtevant*, 4 Denio, 46. And see *Reed v. Moore*, 5 C. & P. 200. — Perhaps the same degree of cruelty which would be good cause for a divorce would be sufficient to authorize the wife to leave her husband, and charge him for her support.

(n) In the case of *Harwood v. Heffer*, 3 Taunt. 421, where the evidence was that the husband treated the wife with great cruelty, and confined her in her chamber under pretence of insanity, and had taken another woman into his house, with whom he cohabited, and on this the wife escaped; the Court of Common Pleas, in 1811, apparently overlooking the fact of the husband's cruelty, did not think that the mere introduction of a prostitute into the family was sufficient to justify the wife's leaving, and taking up necessities on

her husband's account. But this doctrine has been subsequently decidedly condemned, and we think it unsound. See *Houlston v. Smyth*, 10 Moore, 482, 3 Bing. 127; *Hunt v. De Blaquiere*, 5 Bing. 562; *Fredd v. Eves*, 4 Harring. 385. It is said by *Bronson*, C. J., in *Blowers v. Sturtevant*, 4 Denio, 46, that the doctrine contained in *Harwood v. Heffer* cannot be law in a Christian country.

(o) *Rawlins v. Vandyke*, 3 Esp. 250.

(p) *Etherington v. Parrot*, 1 Salk. 118; *McCutchen v. McGahay*, 11 Johns. 281; *Fredd v. Eves*, 4 Harring. 385. Cohabitation is so strong evidence of assent and authority by the husband that he will be liable for necessities furnished the wife, although they were not legally married, and although the tradesman knew it. *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Frec*, 9 B. & C. 167. But cohabitation is not *conclusive* evidence of an authority to purchase even necessities; and it may be rebutted, as by showing that the husband supplied her sufficiently himself, or that he gave her sufficient ready money to make the purchases. *Manby v. Scott*, 1 Sid. 109; *Resolution iii.* 2 Smith's Lead. Cas. (3d ed.) 264. Of course the proof of such facts lies on the husband. *Clifford v. Laton*, 3 C. & P. 15.

supplied to her. (*q*) And where the husband and wife live *separate, there the party supplying her may be regarded, in the words of Lord Mansfield, as standing in her place. And it is for him to make strict inquiry into the terms, cause, and character of the separation; for he trusts her at his peril. If the separation has taken place by the husband's act, and against the wife's will, still, if it be for her adultery, it was so far a justifiable act that the husband is no longer bound even for strict necessities supplied to his wife. (*r*) Whether this rule of law would be modified by the power given in

(*q*) The English authorities are uniform that if the husband and wife live separate and apart, the presumption of law is against the husband's liability, even for the wife's necessities, and that the burden of proof is on the tradesman to show that the separation took place under such circumstances as to continue the husband's liability. *Clifford v. Laton*, 3 C. & P. 15; *Mainwaring v. Leslie*, 2 C. & P. 507; *Bird v. Jones*, 3 Mann. & Ryl. 121; *Edwards v. Towels*, 5 Mann. & Grang. 624; *Hindley v. Westmeath*, 6 B. & C. 200; *Blowers v. Sturtevant*, 4 Denio, 46; *Walker v. Simpson*, 7 Watts & Serg. 83; *Cany v. Patton*, 2 Ashm. 140. But in *Rumney v. Keyes*, 7 New Hamp. 571, where the question as to the burden of proof and the presumptions of law in such case were much discussed, the rule is adopted that the burden of proof is on the husband to show that the separation was not through his fault, and *prima facie*, his liability still continues for his wife's necessities. See also *Frost v. Willis*, 13 Verm. 202; *Clancy on Husband & Wife*, 28.

(*r*) *Hardie v. Grant*, 8 C. & P. 512; *Hunter v. Boucher*, 3 Pick. 289; *Child v. Hardyman*, 2 Strange, 875; *Mainwaring v. Sands*, 1 Strange, 706; *Morris v. Martin*, 1 Strange, 647. And in such case no notice to the tradesman of the wife's adultery and separation is necessary in order to discharge the husband from his liability. *Morris v. Martin*, 1 Strange, 647; *Mainwaring v. Sands*, 1 Strange, 707. — Or if any notice is necessary, general notoriety is sufficient. *Parker, C. J.*, in *Hunter v. Boucher*, 3 Pick. 289. And in like manner if the husband and wife live apart by consent, he paying her a suffi-

cient maintenance, he is not liable for her necessities, she having been guilty of adultery after the separation. *Cragg v. Bowman*, 6 Mod. 147. And the same rule applies where the wife voluntarily, and without any fault in the husband, elopes from him, but has not been guilty of actual adultery; in such case the husband cannot be made liable for necessities furnished the wife by third persons, although they had no knowledge of the elopement. *Brown v. Patton*, 3 Humph. 135; *McCutchen v. McGahay*, 11 Johns. 281; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Cany v. Patton*, 2 Ashm. 140. However, although the wife be actually guilty of adultery, yet if *cohabitation continue*, the husband is still liable for her necessities. *Norton v. Fazan*, 1 B. & P. 226; *Harris v. Morris*, 4 Esp. 41. Let a woman be ever so vicious, yet while she cohabits with her husband he is bound to provide necessities for her, and is liable to the actions of such persons as furnish her with them; for his bargain was to take her for better or for worse. Per *Holt, C. J.*, in *Robison v. Gosnold*, 6 Mod. 171. For continued cohabitation after knowledge of her adultery is a condonation of her offence. *Quincy v. Quincy*, 10 New Hamp. 272; *Hall v. Hall*, 4 New Hamp. 462. And even if the husband had no knowledge of her adultery, yet if he continue to live with her he would be liable for her necessities; for, as we have before seen, any man living with any woman, *as man and wife*, is liable for her support, although they were never married, and the tradesman knew it. *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167.

nearly all our States to the husband, to obtain a divorce *a vinculo* from the wife for her adultery, may be doubted. We see no good reason why it should be, and our cases which touch upon this question seem to adopt the English view. (s) But more question may exist as to another part of the English law on this subject; for it has been there distinctly decided that if the husband commits adultery, and brings his adulteress into his house, and treats his wife with great cruelty, and then turns her out into the streets, and she afterwards commits adultery, and then being repentant, offers to return to him, and is wholly without means of subsistence, nevertheless no action for furnishing her with necessaries is maintainable. (t) But this is certainly very severe law, and our courts would be very reluctant to apply it. If the husband rests his defence upon the wife's adultery, it must be very strictly proved, and a verdict in an action for criminal conversation is not admissible as evidence to prove it. (u) If after such adultery the husband receives her back into his house, he must maintain her as before; and cannot discharge himself of his liability for necessaries supplied to her but by proof of a new act of adultery. (v)

If the wife leaves the husband without just cause, and refuses to cohabit with him, then it is certain that she loses all right to a maintenance from him. For the opposite rule would encourage a wilful breach of the marriage vow and

(s) See *Hunter v. Boucher*, 3 Pick. 291.

(t) *Govier v. Hancock*, 6 T. R. 603. And it has likewise been held in England that a husband is not liable to the penalty of stat. 5 Geo. 4, c. 83, § 3, for neglecting and refusing to maintain his wife, who has left him and committed adultery, although he has himself since her departure been guilty of the same crime. *King v. Flintan*, 1 B. & Ad. 227.

(u) *Hardie v. Grant*, 8 C. & P. 512. Because it is *res inter alias partes*.

(v) *Harris v. Morris*, 4 Esp. 41. This was an action of assumpsit to recover for necessaries furnished to the defendant's wife. It appeared that the wife had formerly eloped for adultery, and been in the Magdalen Asylum; but

that the defendant had afterwards taken her back. *Held*, that under these circumstances he was liable. Lord *Kenyon* said: — "With respect to her having been formerly guilty of adultery, and having been in the Magdalen Asylum, though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back, and she was from that time entitled to dower; she was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors." And where the husband left his wife, who had been guilty of adultery, still living in his house, with two children bearing his name, he was held liable for necessaries

duty, and weaken the wholesome influences which keep together those who have solemnly agreed to live together. (*w*)

*By the civil law also, if a wife leave her husband without his fault, he is not obliged *ei aliquantulum subministrare*. (*x*) But if after deserting him she offers to return, we think his obligation to receive her or maintain her must depend upon the circumstances of her separation, and its length, and her conduct during the separation. If no sufficient objection arises from these circumstances, then he is bound to receive her; otherwise not. (*y*) We repeat, therefore, that if the wife lives separate from her husband, it is obvious, from the many questions which may be raised, that it is incumbent on one who would supply her with necessaries on the husband's credit, but without his express authority, to look cautiously into all the facts and circumstances. (*z*)

When the separation takes place by the consent and agreement of both parties, something of uncertainty arises, from the conflict between the unwillingness of the law to permit and sanction such violation of marriage obligation and duty, on the one hand, and on the other its disposition to allow such a separation under circumstances which give it a color of reason, and to hold all parties to their contracts made in relation to it, so far as may be done without placing the power of a dissolution of marriage too much in the hands of the married parties. Thus, it is said by Sir William Scott,

supplied her, by one who did not know the circumstances. *Norton v. Fazan*, 1 B. & P. 226.

(*w*) *Manby v. Scott*, 1 Sid. 129; *Brown v. Patton*, 3 Hump. 135; *McCutchen v. McGahay*, 11 Johns. 281; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Williams v. Prince*, 3 Strob. L. 490. — If, however, she offers to return, not having been guilty of adultery, and the husband refuses to receive her, his liability for her future necessities is thereby revived. *McCutchen v. McGahay*, 11 Johns. 281; *Clement v. Mattison*, 3 Richardson, 93; *Cunningham v. Irwin*, 7 S. & R. 247. — And if such application is made to the husband by some third person on behalf of the wife, and he, without questioning such third person's authority, put his refusal

on some other ground, it will be equivalent to a personal application by the wife herself. *McGahay v. Williams*, 12 Johns. 293. — So if husband and wife separate by consent, and provision is made by him for her maintenance, if the wife during such separation purchase necessities, and the parties subsequently cohabit together, the husband will be liable for them. *Rennick v. Ficklin*, 3 B. Monroe, 166.

(*x*) Dig. Lib. 23, Tit. 3.

(*y*) In *Henderson v. Stringer*, 2 Dana, 293, it is said: — "If she offers to return, and he, *without sufficient cause*, refuses to receive her, his liability is revived."

(*z*) See *Blowers v. Sturtevant*, 4 Denio, 46.

that the obligations of the marriage contract are not to be relaxed at the pleasure of one party, or at the pleasure of both. (a) And it is well settled that they cannot by any contract destroy each other's rights. Let the covenant of separation be never so formal or solemn, either party may at any time insist upon a restoration of all the rights which belong to the relation of marriage. (b) But if after such a *deed, and a separation consequent upon it, the husband institutes proceedings to recover the society of his wife, the deed, though no bar, may still be evidence as to the character of the separation, and if this be shown to have arisen from his misconduct, either by the deed itself or otherwise, he cannot succeed. (c) Nevertheless, where such separation is made

(a) See *Evans v. Evans*, 1 Hagg. Consist. R. 118; *Oliver v. Oliver*, Id. 364.

(b) *Mortimer v. Mortimer*, 2 Hagg. Consist. R. 318. In this case Sir William Scott, in commenting upon a plea in bar to a suit for the restitution of conjugal rights, observed:—"The seventh and eighth articles plead the circumstance which led to the deed of separation, and the deed is exhibited. The objection taken against these articles is, that deeds of separation are not pleadable in the ecclesiastical court, and most certainly they are not, if pleaded as a bar to its further proceedings; for this court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices which the parties are not at liberty to desert—an assumption of a false character in both parties contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and man, to live together, 'till death them do part,' and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved." See also *Sullivan v. Sullivan*, 2 Ad-dams, Ecc. R. 303; *Smith v. Smith*, 2 Hagg. Ecc. R. (supp.) 44, n. a.—Although a deed of separation upon mutual agreement, on account of unhappy

differences, contain a covenant not to bring a suit for restitution of conjugal rights, yet it is no bar to such a suit. *Westmeath v. Westmeath*, 2 Hagg. Ecc. R. (supp.) 115.—That deeds of separation between husband and wife amount to nothing more than a mere permission to one party to live separate from the other, and confers no release of the marriage contract on either party, and that neither can violate it, see *Warrender v. Warrender*, 2 Clark & Finn. 561; *Lord St. John v. Lady St. John*, 11 Ves. 526, 532; *Wilkes v. Wilkes*, 2 Dickens, 791; *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow & Clark, 519. *Guth v. Guth*, 3 Bro. C. C. 614, seems *contra*; but this case is not of good authority.

(c) *Rex v. Mary Mead*, 1 Burr. 542. This case was a writ of *habeas corpus*, at the instance of a husband, to bring up the body of his wife, who had separated from him, and who was then living with her mother. The mother brought her daughter into court, and the substance of the return on the writ of *habeas corpus* was, "that her husband having used her very ill, in consideration of a great sum which she gave him out of her separate estate, consented to her living alone, executed articles of separation, and covenanted (under a large penalty,) 'never to disturb her or any person with whom she should live;' that she lived with her mother, at her own earnest desire; and that this writ of *habeas corpus* was taken out with a view of seizing her by force, or some other *bad purpose*."

by an instrument to which a third person is a party, and is a trustee for the wife, and the husband agrees with this trustee to give him a sufficient sum for her maintenance, such trustee may maintain an action on the agreement. (d) And if the trustee *agrees to hold the husband harmless on his liability for his wife, and indemnify him against any farther expenditure for her, the husband may maintain an action on such agreement. (e) Without the intervention of such third

The court held this agreement to be a formal *renunciation* by the husband of his marital right to seize her, or force her back to live with him. And they said, that *any attempt* of the husband to seize her by force and violence would be a *breach of the peace*. They also declared, that any attempt made by the husband to molest her, in *her present return from Westminster Hall*, would be a *contempt* of the court. And they told the lady she was at full liberty to go where and to whom she pleased. And where the wife voluntarily lived apart from her husband, without coercion on the part of any one, it was held that the writ of *habeas corpus* should not be granted to her husband, but that the remedy, if there was no good cause for her remaining apart, was solely in the Ecclesiastical Courts. *Ex parte Sandiland*, 12 E. L. & E. 464.

(d) *Jee v. Thurlow*, 2 B. & C. 547, 4 D. & R. 11; *Wilson v. Mushett*, 3 B. & Ad. 743. In this case the defendant gave a bond to A. and B. conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts, or for living apart from her. By indenture of the same date between the above parties and the wife, reciting that defendant and his wife had agreed to live separate during their lives, and that, for the wife's maintenance, defendant had agreed to assign certain premises, &c., to A. and B., and had given them an annuity bond as above mentioned; it was witnessed that defendant assigned the premises, &c., to them, in trust for the wife, and he covenanted to A. and B. to live separate from her, and not molest her or interfere with her property; and power was given her to dispose of the same by will, and to sell the assigned premises, &c., and buy estates or annuities with the proceeds. The wife

covenanted with the defendant to maintain herself during her life out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture, (except as to the assignment,) and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided that *if the defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture*. There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding that security. *Held*, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond, and the indenture of even date with it, were not really executed with a view to immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing, on a view of the whole instrument, to prevent this court from giving effect to the clause which provided for a continuance of the trusts notwithstanding a reconciliation. See also *Logan v. Birkett*, 1 My. & Keene, 225.

(e) *Summers v. Ball*, 8 M. & W. 596, where a deed of separation between husband and wife contained a covenant by the wife and her trustees, that she, her executors or administrators, or the trustees or some or one of them, should and would at all times save, defend, and keep harmless and indemnified the husband from and against the debt or debts, sum or sums of money, which she the

party, the husband and wife cannot contract together, being but one person in the view of the law. (*f*) But such agreement must be absolute and unconditional, and not dependent upon the contingency of a future separation, nor upon the wife's future consent to live separate, for then it is regarded as an inducement to separation, and is therefore wholly *void. (*g*) And if the covenant be in general to pay an annuity to the wife, the consideration for it being the separation, and in the nature of a continuing consideration, a subsequent reconciliation and cohabitation discharges the husband from his obligation. (*h*) But the agreement may be expressly to pay to her or for her use such annuity during her life, and then it is not affected by a subsequent cohabitation. (*i*) And it would seem that if the annuity is ex-

wife had then, at the time of the making of the indenture, contracted, or which she should, at any time thereafter, during the separation, contract. *Held*, that this covenant included debts previously contracted by the wife for necessities while living with the husband.

(*f*) Co. Litt. 112, a; Reeve's Dom. Rel. 89, 90; *Marshall v. Rutton*, 8 T. R. 545; *Carter v. Carter*, 14 Sm. & Mar. 59. He cannot convey property directly to her. *Martin v. Martin*, 1 Greenl. 394. — There is a recent case upon this point, decided by the Supreme Court of Massachusetts, by the name of *Jackson v. Parks*, not yet reported. It was assumpsit on two promissory notes, made by the defendant's testator to the plaintiff, his wife, during coverture. The consideration of the notes was certain property which the plaintiff held in her own right, which passed to her husband. The court held that the action could not be sustained. In *Sweat v. Hall*, 8 Verm. 187, the same doctrine has been established.

(*g*) *Westmeath v. Salisbury*, 5 Bligh, N. S. 393; *Durant v. Titley*, 7 Price, 577; *Hindley v. Westmeath*, 6 B. & C. 200; *Jee v. Thurlow*, 2 B. & C. 547; *Jones v. Waite*, 9 C. & F. 101.

(*h*) *Scholey v. Goodman*, 1 C. & P. 36.

(*i*) *Wilson v. Mushett*, 3 B. & Ad. 743. In this case Lord *Tenterden*, C. J., said:—"I think it is impossible for us, sitting in a court of law, to say that this

deed, and the bond on which the action is brought, were avoided by the reconciliation alleged in the plea. The argument for the defendant must be, that if the husband and wife had agreed to live together again, even for a few hours, and afterwards separated, all the provisions of the deed were put an end to by condonation. I think that upon this deed we cannot come to such a conclusion. Whether a court of equity would enforce all the trusts or not is a question with which we have nothing to do. One proviso of the deed is, that if the defendant and his wife shall thereafter agree to cohabit again, such cohabitation shall in no way alter the trusts thereby created, but they shall stand valid, and of as full effect to all intents and purposes, as well during such cohabitation as in case they again live separate; and it is said that this is inconsistent with other parts of the instrument of separation. But I do not see the objection. The settlement made on the wife may have been intended to continue at all events as an allowance in the nature of pin-money. At least, I cannot say that a deed like this becomes altogether void on a reconciliation. It would be contrary to the express provision of the deed, inserted, perhaps, in contemplation that the wife might, under some circumstances, choose rather to live with her husband again, enjoying the annuity settled upon her, than to continue separate."

pressly to be paid during the continuance of a separation by mutual consent, and the husband forfeits his marital rights by his own misconduct, he can no longer put an end to the separation, nor to his obligation to pay the annuity. (j) And if such agreement to pay an annuity do not expressly except adultery on her part, neither that nor a divorce because of it would discharge his obligation. (k) But it must *be remembered that such divorce in England would be only (unless by act of Parliament,) *a mensa et thoro*; whereas in this country it would be *a vinculo*, and thus might perhaps put an end to such obligation.

If, upon such separation, property has been settled on the wife and children for their support, it would be upheld against subsequent creditors, unless the settlement were shown to be without good faith. (l)

If there be separation by consent, and a specific sum settled upon the wife, which is reasonably sufficient for her necessities, then the husband is not liable for necessities supplied to her. (m) Nor is he so liable even if the party so

(j) *Whoregood v. Whoregood*, 1 Ch. Cas. 250.

(k) *Baynon v. Batley*, 8 Bing. 256; *Jee v. Thurlow*, 2 B. & C. 547. By deed of three parts between husband and wife and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. *Held*, that this deed was legal and binding, and that a plea by the husband that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *a mensa et thoro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *Abbott, C. J.* "The only question is upon the sufficiency of the plea. It has been decided that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a

deed as this, thinks proper to enter into an unqualified covenant he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quam diu casta vixerit*."

(l) *Hobbs v. Hull*, 1 Cox, 445; *Stephens v. Olive*, 2 Brown, C. C. 91; *Nunn v. Wilmore*, 8 T. R. 521.

(m) *Angier v. Angier*, Gilb. Eq. R. 152; *Stephens v. Olive*, 2 Bro. C. C. 90; *Todd v. Stokes*, 1 Salk. 116, 1 Ld. Raym. 444. This allowance must be reasonably sufficient for the wife to the satisfaction of a jury; and the mere acquiescence on the part of the wife in the sum paid will not necessarily exonerate the husband. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Liddlow v. Wilmot*, 2 Starkie, 87; *Emmett v. Norton*, 8 C. & P. 506. The sum stipulated by the husband must have been *actually paid*, or the husband is not discharged, and the wife is not driven to her remedy on the instrument of separation, but may bind her husband on her contracts. *Nurse v. Craig*, 5 B. & P. 148; *Hunt v. De Blaquiére*, 5 Bing. 550.

furnishing goods did not know of the provision made for the wife; unless this party had supplied her before, and the separation was recent and not notorious; (n) the fact of separation, if he knew it, was enough to put him upon inquiry. But the party supplying necessities to a separated wife is *not bound to show that no provision is made for her; if the husband undertakes to relieve himself from his liability by the fact of such provision, the burden of proving it lies on him; (o) and if it be inadequate, or not duly paid, he is liable. (p) But he is not liable, even if the separation were not by deed, and there is no written agreement between them as to the allowance, if it be in fact paid to her. (q) And he is also

(n) In *Rawlins v. Van Dyke*, 3 Esp. 250, Lord Eldon is reported to have held, that in cases of separation between man and wife, if the tradesman's demand is for necessities, it is incumbent on the husband, in order to discharge himself, to show that the tradesman had notice of the separation. But this doctrine was directly repudiated in the late case of *Mizen v. Pick*, 3 M. & W. 481, and *Alderson, B.*, there said:—"I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself—with every thing proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable." It has likewise been held in this country that if the tradesman was not accustomed to trust the wife before separation, neither express notice nor general notoriety of the fact of separation is necessary to discharge the husband. *Cany v. Patton*, 2 Ashm. 140. And see *Baker v. Barney*, 8 Johns. 72; *Mott v. Comstock*, 8 Wend. 544; *Wilson v. Smyth*, 1 B. & Ad. 801.

(o) See *Frost v. Willis*, 13 Verm. 202; *Rumney v. Keyes*, 7 New Hamp. 571; *Clancy on Husband and Wife*, 28. But in *Mott v. Comstock*, 8 Wend. 544, it was held that if a husband professes to provide for his wife, who lives apart from him, it is incumbent upon a party who has been expressly forbidden to give her credit to show clearly and affirmatively that the husband did not supply her with necessities suitable to her condition, before he can charge him for sup-

plies furnished her; and this seems to be the better law. But in *McClallen v. Adams*, 19 Pick. 333, where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence, and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation on her for the cure of the disease, soon after which she died, it was held, in an action by the plaintiff against the defendant, to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if in his judgment it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant.

(p) *Hodgkinson v. Fletcher*, 4 Camp. 70; *Liddlow v. Wilmot*, 2 Starkie, 87; *Emmet v. Norton*, 8 C. & P. 506; *Hunt v. De Blaquiére*, 5 Bing. 550.—It has been held that notwithstanding the husband pay the wife a sufficient allowance, yet if he expressly promise to pay the debts she has contracted during such separation, he is bound by such promise. *Harrison v. Hall*, 1 Mood. & Rob. 185; *Hornbuckle v. Hornbury*, 2 Starkie, 177. But these cases seem certainly very anomalous, and difficult to be supported, since if the allowance was duly paid, and was adequate, the husband's promise would be *nudum pactum*.

(q) No deed of separation is actually

under no liability if sufficient necessities be provided for her by another person, and none by him. (r) The rule of law is, that if a wife be separated from her husband, with her consent, he is liable for necessities supplied to her only where in fact she has no other means of obtaining them. But under any circumstances of separation, the husband may be * held to answer to articles of the peace against him, if occasioned by his violent conduct towards her, (s) and even held liable to pay the bill of the attorney whom she employs for that purpose. (t) But he has been held not liable to pay

necessary; it is sufficient if a separation actually took place. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emery v. Neighbour*, 2 Ilalst. 142; *Lockwood v. Thomas*, 12 Johns. 248; *Kimball v. Keyes*, 11 Wend. 33. But if the separate maintenance be secured by deed, it is held that the deed is void unless executed by a trustee on the part of the wife. *Ewers v. Hutton*, 3 Esp. 255.

(r) It is immaterial from what source the wife's provision comes, provided it be sufficient and permanent. *Liddlow v. Wilmot*, 2 Starkie, 86; and see *Dixon v. Hurrell*, 8 C. & P. 717. The case of *Thompson v. Hervey*, 4 Burr. 2177, sometimes cited as deciding that the provision must be derived from the husband in order to discharge him, seems to have proceeded rather on the ground that the provision was purely voluntary, and during the pleasure of the grantor, and therefore that creditors could not be supposed to rely upon it.

(s) *Turner v. Rookes*, 10 Ad. & El. 47. This was an action of assumpsit to recover for services rendered by the plaintiff, as solicitor, to the defendant's wife, in exhibiting articles of the peace against the defendant. It appeared that the defendant and his wife had been separated for seven years, she living upon a maintenance of £112 per annum, which the defendant had secured to her by deed. The cause of separation did not appear. It further appeared that the defendant had used such threats and violence against his wife as authorized her to exhibit articles of the peace against him. It was held that the plaintiff was entitled to recover.

(t) *Shepherd v. Mackoul*, 3 Camp. 326. But this was on the ground that in that particular case the step was actually necessary on the part of the

wife. And see preceding note. In *Shelton v. Pendleton*, 18 Conn. 417, where A., the wife of B., without his assent in fact, employed C., an attorney and counsellor at law, to prosecute, on A.'s behalf, a petition to the superior court against B., for a divorce from him, for a legal and sufficient cause, with a prayer for alimony, and the custody of the minor children, and C. performed services and made disbursements, in the prosecution of such petition, which was fully granted and thereupon brought his action against B. for a reasonable remuneration; it was held, 1st, that the facts in the case showed that C. looked for payment and gave credit to A. alone; 2d, that the services and disbursements in question were not necessities, for which B. as the husband of A. was liable; 3d, that C.'s claim derived no strength from the fact that to the petition for a divorce was appended a prayer for alimony and the custody of the minor children; 4th, that consequently C. was not entitled to recover. *Church, C. J.*, commenting on the case of *Shepherd v. Mackoul*, said:—"The common law defines necessities to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence. And we know of no case which has professed to extend the catalogue of necessities, unless it be *Shepherd v. Mackoul*, 3 Camp. 326. That was an action by an attorney to recover of a husband a bill for assisting his wife to exhibit articles of the peace against him. And Lord Ellenborough said, that the defendant's liability would depend upon the necessity of the measure; and if that existed she might charge her husband for the necessary expense, as much as for necessary food or raiment. It is

the bill of an attorney whom she employs to procure an indictment of him. (*u*)

A liability, very similar to that which falls upon one who is legally a husband, rests also upon him who lives with a woman as his wife, who is not so. If he holds her out to the public as his wife, then he promises the public that he will be as responsible for her as if she were so. (*v*) Hence he is liable, as for his wife, to a tradesman who knew that they were not married. (*w*) The ground of his liability is not that he deceived persons into an erroneous belief that she was his wife, but that after voluntarily treating her as such, and so inducing persons to believe that he would continue to treat her as such, he cannot recede from the liabilities which he thus assumes. But this liability ceases with cohabitation; he is not responsible for necessities supplied to her afterwards, even where they had lived together a long time, and she had left him because of his ill conduct. (*x*)

manifest that the court considered that case as falling literally within the established doctrine of the common law on this subject—the necessity of preserving the life and health of the wife. The duty of providing necessities for the wife is strictly marital, and is imposed by the common law, in reference only to a state of coverture, and not of divorce. By that law a valid contract of marriage was and is indissoluble, and therefore by it the husband could never have been placed under obligation to provide for the expenses of its dissolution. Such an event was a legal impossibility. Necessaries are to be provided by a husband for his wife, to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man. It was on this principle that the aforesaid case of *Shepherd v. Mackoul* was decided; and the latter case of *Ladd v. Lynn*, 2 M. & W. 265, in which it was holden that a husband was not liable for expenses incurred by the wife in procuring a deed of separation, proceeded upon the same principle.”

(*u*) Because that is not necessary. *Grindell v. Godmond*, 5 Ad. & El. 755. Nor for the counterpart of the deed of separation, procured by the wife's trustee, unless he expressly promise to pay. *Ladd v. Lynn*, 2 M. & W. 265. Nor is

a husband liable to an attorney for professional services rendered to the wife in defending against his petition for a divorce for her fault, nor on her petition against him for his. *Wing v. Hurlburt*, 15 Verm. 607; *Dorsey v. Goodenow*, *Wright*, 120. And see *Shelton v. Pendleton*, cited in the preceding note. Nor is the woman herself liable, unless she expressly promise to pay them, after the divorce. *Wilson v. Burr*, 25 Wend. 386. If there is evidence of an express agreement to pay such bills, the husband may then be liable. *Williams v. Fowler*, 1 McC. & Y. 269.

(*v*) *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167; *Munro v. De Chemant*, 4 Camp. 215; *Carr v. King*, 12 Mod. 372; *Graham v. Brettell*, 18 Law Times Reps. 185.

(*w*) *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Ryan v. Sams*, 12 Q. B. 460.

(*x*) *Munro v. De Chemant*, 4 Camp. 215. But in *Ryan v. Sams*, 12 Q. B. 460, the facts were that the defendant and a Mrs. S., his mistress, lived together as husband and wife four years, and occupied three residences successively. At each time of their coming into a house, plaintiff was employed to do work and furnish materials for the fitting up. Mrs. S. as well as the de-

Proof of cohabitation seems to be sufficient *primâ facie* evidence in an action against husband and wife for her debt before marriage. (y)

In England it has been decided, that if a marriage has taken place *de facto*, the husband cannot defend against an action brought on promises made by the wife before coverture, by showing that the marriage was illegal, and therefore void, because only the spiritual courts can take cognizance of such questions. (z) But in this country, as we have no such courts, the defence could not be objected to on these grounds.

In England, a married woman, trading independently of her husband within the city of London, may, by the "custom of London," sue and be sued as a feme sole, with reference to such dealings of trade. (a) But even there the husband

defendant gave directions; and the defendant sanctioned her orders and paid the bills. Plaintiff knew that she was only his mistress. While residing in the third house they separated; but Mrs. S., without defendant's sanction, sent for plaintiff to that house, which she had not yet left, and ordered fittings up, for a new house of her own. Plaintiff did the work, and had not, in the mean time, any notice of the separation. Held, in an action for the last-mentioned work and goods, that it was a proper question for the jury whether or not the defendant had given the plaintiff reason to believe that Mrs. S., at the time of the orders, continued to be defendant's agent; and that, on their finding in the affirmative, the defendant was liable. Lord Denman, C. J. "In *Munro v. De Chemant*, 4 Camp. 215, it may be presumed that the parties had lived long separate; and it is consistent with the statement there that Lord Ellenborough may have noticed that circumstance as important if the parties were not married, but told the jury, 'if you think they are proved to have been man and wife the case will be different.' And the order there seems to have commenced a new account. Here the defendant sanctions orders to the plaintiff in the name of Stanley, while the person in question is living with him under that name, and she afterwards gives orders to the plaintiff in the same name, circumstances apparently continuing un-

altered. It would be unreasonable to expect more evidence in such a case." And in *Blades v. Free*, 9 B. & C. 167, where a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad, it was held, that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received.

(y) *Tracey v. McArlton*, 7 Dowl. P. C. 532. And see *Norwood v. Stevenson*, Andrews, R. 227. But to be liable for the wife's torts committed before coverture, a marriage *de facto* is not sufficient; and a man with whom a woman already married contracts matrimony, her first and lawful husband still living, is not responsible for her torts committed before coverture. *Overholt v. Ellswell*, 1 Ashm. 200. And the same reasoning would seem to apply to her debts contracted before coverture. And a husband is not liable for the debts of his wife *dum sola*, unless the wife herself was liable for them at the time of her marriage. *Caldwell v. Drake*, 4 J. J. Marsh. 247.

(z) *Norwood v. Stevenson*, Andrews, 227.

(a) Bac. Abr. Baron and Feme, (M.)

should be made a party to the suit, (b) though she will be treated as the substantial party. Elsewhere in England she can act as a single woman only when the legal existence of her husband may be considered as extinguished, wholly or for a definite period; as in case of outlawry, abjuration of the realm, or transportation *for life, or for a limited term. (c) In this country, however, in part by statute, as in Pennsylvania and South Carolina, (d) and in part by the decisions of the courts, the law is much more reasonable, and a married woman may act as if unmarried, under many circumstances; as for continued abandonment, (e) alienage, and

(b) *Caudell v. Shaw*, 4 T. R. 361; *Beard v. Webb*, 2 B. & P. 93; *Starr v. Taylor*, 4 McCord, 413; *Laughan v. Bewett*, Cro. Car. 68.

(c) *Marshall v. Rutton*, 8 T. R. 545. And a married woman cannot there be sued on her contracts, although she live apart from her husband in a state of adultery, and there exist a valid divorce *a mensa et thoro*, and she contract during such separation in the assumed character of a single woman. *Lewis v. Lee*, 3 B. & C. 291, 5 D. & R. 98; *Faithorne v. Blaquiere*, 6 M. & S. 73; *Turtle v. Worsley*, 3 Doug. 290. But see *Cox v. Kitchin*, 1 B. & P. 338. Neither is her personal representative liable under such circumstances, although he have abundant assets. *Clayton v. Adams*, 6 T. R. 604. But if the legal existence of the husband is considered as extinguished, the wife may contract as a feme sole. *Lady Belknap's case*, Year Book, 1 Hen. 4, 1, a; *Lean v. Shutz*, 2 Bl. 1197; *Marsh v. Hutchinson*, 1 B. & P. 231; *Ex parte Franks*, 7 Bing. 762, 1 M. & Scott, 1; *Carrol v. Blencow*, 4 Esp. 27; *Stretton v. Busnach*, 1 Bing. N. C. 140.

(d) In Pennsylvania and South Carolina a wife may become a sole trader, and become liable as such, in imitation of the custom of London. *Starr v. Taylor*, 4 McCord, 413; *Newbiggin v. Pillans*, 2 Bay, 162; *McDowall v. Wood*, 2 N. & McC. 242; *Burke v. Winkle*, 2 S. & R. 189; *Jacobs v. Featherstone*, 6 W. & S. 346. She must, however, in order to have the privilege of contracting as a feme sole, be technically a trader. *McDaniel v. Cornwell*, 1 Hill, (So. Car.) 428. The privilege does not extend to a woman who is a common

carrier. *Ewart v. Nagel*, 1 McMullan, 50. Nor to one who was separated from her husband, and supported herself by her daily labor. *Robards v. Hutson*, 3 McCord, 475. Keeping a shop as a milliner brings her within the privilege. *Surtell v. Brailsford*, 2 Bay, 333. But her privilege to contract as a feme sole extends no farther than to such contracts as are connected with her trade. *McDowall v. Wood*, 2 N. & McC. 242. And see *Wallace v. Rippon*, 2 Bay, 112.

(e) If the husband is banished, then, as we have seen, by the laws of England and of this country, a wife may contract as a feme sole. *Wright v. Wright*, 2 Des. 244. And the law is the same whether he is banished for his crimes, or has voluntarily abandoned his wife. *Rhea v. Rhenner*, 1 Peters, 105. The voluntary absence of the husband, however, must be more than temporary in order to have this effect. *Robinson v. Reynolds*, 1 Aikens, 174; *Gregory v. Pierce*, 4 Met. 478; *Commonwealth v. Collins*, 1 Mass. 116; *Chouteau v. Merry*, 3 Missouri, 254. If it amount to absolute and complete desertion, then it may be sufficient. Cases *supra*. Whether the imprisonment of the husband for life, or a term of years, in our State prisons, will have the same effect, is more doubtful. See 21 Am. Jur. 8; 1 Swift's Dig. 36; *Cornwall v. Hoyt*, 7 Conn. 427. If the husband is an alien, and never resided in this country, the wife may sue and be sued as a feme sole. *Kay v. Duchess de Pienne*, 3 Camp. 123; *Deerly v. Mazarine*, 1 Salk. 116; *Robinson v. Reynolds*, 1 Aik. 174; *De Gaillon v. L'Aigle*, 1 B. & P. 356, compared with *Farrer v. Granard*,

non-residence, or the privity and acquiescence of the husband, although not expressed by deed. (*f*)

4 B. & P. 80. But this rule is qualified sole, or the plaintiff has knowledge of
in *Barden v. Keverberg*, 2 M. & W. 61, the facts.
in which it is held that she is responsible (*f*) *McGrath v. Robertson*, 1 Des.
only if she represents herself as a feme 445.

CHAPTER XVIII.

BANKRUPTS AND INSOLVENTS.

At this time we have in this country no national law of bankruptcy. In the several States there are insolvent laws, which more or less approach the character of a bankrupt law. These laws are very various, and seldom remain long without change. Nor would it be well to occupy many pages of this volume with details of their various provisions, as at this moment established. We shall only attempt to state the general principles which apply to the contracts of parties whose property has passed from their hands for the purpose of being divided among their creditors.

Between a bankrupt law and an insolvent law there does not appear to be any established and well-settled distinction. It may be essential to a bankrupt law, that, on the one hand, any trader, when it becomes certain that he cannot pay his debts, should be compelled by it to surrender his property for their payment as far as it will go; and, on the other, that such debtor may then have a discharge from his liabilities, if he has not forfeited his right to this discharge by misconduct. But an insolvent law is sometimes said to differ in theory from a bankrupt law in this, that it does not proceed in reference to a debtor against his will, but provides means whereby he may distribute his effects equally, and then obtain a discharge. If this distinction exists, it is not always observed; and sometimes it seems rather to be held that while a bankrupt law discharges the debt, an insolvent law only relieves from imprisonment. This is certainly the case in many of our States.

In this country the great questions which have occasioned much difficulty have sprung from the clause in the Constitution of the United States, prohibiting the several States

from passing any law "impairing the obligation of contracts." But these questions, and those which arise from the operation of bankrupt and insolvent laws on contracts, will be examined in the Second Part of this work, in which contracts will be considered in reference to the operation of law upon them.

It is so far acknowledged that a discharged bankrupt or insolvent still lies under a moral obligation to pay his debts in full, when he can, that this obligation is, at common law, a sufficient consideration to sustain an actual promise to do so. (*g*) This promise, however, must be distinct and specific, (*h*) and it has been held that the payment of interest, or even payment of part of the principal and its indorsement on the note by the debtor himself is not sufficient to warrant a jury in finding a new promise to pay the whole debt. (*hh*) Where such promise is made, it does not seem to be necessary to declare upon it as the foundation of a suit, but an action may be brought upon the old promise, and the new promise will have the effect of doing away the obstruction otherwise interposed by the bankruptcy and discharge. (*i*)

(*g*) *Scouton v. Eislord*, 7 Johns. 36; *Fleming v. Hayne*, 1 Starkie, 370; *Freeman v. Fenton*, 1 Cowp. 544; *Twiss v. Massey*, 1 Atk. 67; *Ex parte Burton*, Id. 255; *Birch v. Sharland*, 1 T. R. 715; *Besford v. Saunders*, 2 H. Bl. 116; *Brix v. Braham*, 8 Moore, 261, 1 Bing. 281; *Erwin v. Saunders*, 1 Cow. 249; *Shippey v. Henderson*, 14 Johns. 178; *Maxim v. Morse*, 8 Mass. 127; *Way v. Sperry*, 6 Cush. 238; *Best v. Barber*, 3 Doug. 188; *Trumbull v. Tilton*, 1 Fqster, 128. The promise should be made after the decree in bankruptcy discharging the debt—a promise made after the petition in bankruptcy was filed merely, but before the decree, is not sufficient. *Stebbins v. Sherman*, 1 Sand. Sup. Ct. 510. In England, however, by statute 6 Geo. 4, c. 16, a promise by a bankrupt must be *in writing*, and signed by the bankrupt, or by some person thereto by him lawfully authorized.—A promise by a debtor to pay a debt which has been voluntarily released by the creditor is not binding, for want of consideration. *Warren v. Whitney*, 24 Maine, 561; *Snevily v. Read*, 9 Watts, 396. And this although the release was given without consideration, and merely to enable the debtor to testify in a suit

against the creditor, in which he could not have otherwise testified because of a legal interest. *Valentine v. Foster*, 1 Met. 520. But see *Willing v. Peters*, 12 S. & R. 177.

(*h*) It must be an absolute and unconditional promise to pay the debt. *Brown v. Collier*, 8 Humph. 510. The words "I have always said, and still say, that she shall have her pay," spoken to an agent of the creditor, may be construed by the jury as an express promise to pay. *Pratt v. Russell* 7 Cush. 462.—Mere statements to third persons that he had promised to pay the debt are not in themselves sufficient. They afford some ground to raise the presumption of a promise, but are not such in themselves. *Prewett v. Caruthers*, 12 S. & M. 491; *Yoxtheimer v. Keyser*, 11 Penn. 365.

(*hh*) *Merriam v. Bayley*, 1 Cush. 77; *Cambridge Institution for Savings v. Littlefield*, 6 Cush. 210.

(*i*) *Williams v. Dyde*, Peake, N. P. 68; *Maxim v. Morse*, 8 Mass. 127; *Shippey v. Henderson*, 14 Johns. 178; *Depuy v. Swart*, 3 Wend. 135.—If the old debt was due by note or specialty, a *parol* promise merely will not sustain

But if the promise is conditional, then the party seeking to enforce it must show the condition satisfied; as if the debtor promised to pay when he was able, then the creditor must prove his ability. (*j*) In such case, and perhaps in all, it * would be safer to rely upon the new promise as the ground of the action, and upon the old promise only as the consideration for the new one, (*k*) as in many cases it has been held that the new promise does not revive the negotiability of a bill or note, but binds the insolvent only to the person to whom the contract was made. (*kk*) The contrary has however been decided. (*kl*)

an action on the note or specialty itself. *Graham v. Hunt*, 8 B. Monroe, 7.

(*j*) *Besford v. Saunders*, 2 H. Bl. 116; *Fleming v. Hayne*, 1 Stark. 370; *Branch Bank v. Boykin*, 9 Ala. 320; *Scouton v. Eislord*, 7 Johns. 36; *Bush v. Barnard*, 8 Johns. 407.— So in promises by an adult to pay “when he is able” a debt contracted during infancy, the defendant’s ability to pay must be shown. *Penn v. Bennett*, 4 Camp. 205; *Cole v. Saxby*, 3 Esp. 160; *Davies v. Smith*, 4 Esp. 36; *Thompson v. Lay*, 4 Pick. 48; *Everson v. Carpenter*, 17 Wend. 419. So of a promise to pay a

debt barred by the statute of limitations. *Tanner v. Smart*, 6 B. & C. 603; *Haydon v. Williams*, 7 Bing. 163; *Gould v. Shirley*, 2 M. & P. 581; *Tompkins v. Brown*, 1 Denio, 247; *Laforge v. Jayne*, 9 Penn. 410.

(*k*) *Penn v. Bennett*, 4 Camp. 205; *Fleming v. Hayne*, 1 Stark. 371; *Wait v. Morris*, 6 Wend. 394.

(*kk*) *Depuy v. Swart*, 3 Wend. 135; *Moore v. Viele*, 4 Wend. 420; *Walbridge v. Harroon*, 18 Verm. 448; *White v. Cushing*, 30 Maine, 267; *Graham v. Hunt*, 8 B. Mon. 7.

(*kl*) *Way v. Sperry*, 6 Cush. 238.

CHAPTER XIX.

PERSONS OF INSUFFICIENT MIND TO CONTRACT.

Sect. I. — *Non Compotes Mentis.*

THEY who have no mind, "cannot agree in mind" with another; and as this is the essence of a contract, they cannot enter into a contract. But there is more difficulty when we consider the case of those who are of unsound mind, partially and temporarily; and inquire how the question may be affected by the cause of this unsoundness.

It was once held that no man could discharge himself from his liability under a contract by proof that when he made it he was not of sound mind; on the ground that no man should be permitted to stultify himself. (*l*) This is not now the law, either in England or in this country. If one enters into a contract while deprived of reason, and afterwards recovers his reason, he may repudiate that contract. (*m*)

(*l*) Litt. sect. 405, 406; Beverley's case, 4 Co. Rep. 126; Stroud v. Marshall, Cro. El. 398; Cross v. Andrews, Id. 622. But this was contrary to the most ancient authorities. See 2 Bl. Com. 291. — In Waring v. Waring, 12 Jur. 947, (1848,) the nature and the degrees of insanity are very fully considered. It is difficult to define insanity, or to discriminate it precisely from mere weakness of mind, or disturbed imagination. Absolute sanity of mind may or may not be predicated of any person, accordingly as we include therein more or less perfect power of thought and accuracy of judgment. In Waring v. Waring, Lord Brougham holds that no mind which is insane upon any one point can be wholly sound on any subject. If by this any thing more is meant than that an unsound mind is not a sound one, the proposition is opposed to the general, if not universal opinion

of mankind. And perhaps all experience demonstrates that a mind may be, in relation to some one point, what would be called insane by all persons, and yet on others be judged to be sane, if tried by any of the tests usually applied to this question.

(*m*) In Gore v. Gibson, 13 M. & W. 623, the action was assumpsit by the indorsee against the indorser of a bill of exchange. The defendant pleaded that when he indorsed the bill he was so intoxicated as to be unable to comprehend the meaning, nature, or effect of the indorsement; of which the plaintiff at the time of the indorsement had notice. Held to be a good answer to the action. Parke, B. "Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this is known to the other party, the contract is void

And this although his temporary insanity was produced by his own act, as by intoxication. (n) But he must not make use of his intoxication as a means of cheating others. If he made himself drunk with the intention of avoiding a contract entered into by him while in that state, it may well be doubted whether he would be permitted to carry this fraud into effect. And if he bought goods when drunk, but keeps them when sober, his drunkenness is no answer to an action for the purchase-

altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication, and total drunkenness is now held to be a defence." See *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whidden*, 2 New Hamp. 435; *Seaver v. Phelps*, 11 Pick. 304; *McCreight v. Aiken*, 1 Rice, 56; *Yates v. Boen*, 2 Strange, 1104; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Rice v. Peet*, 15 Johns. 503; *Owing's case*, 1 Bland, 377; *Horner v. Marshall*, 5 Munf. 466; *Fitzgerald v. Reed*, 9 Smedes & Mar. 94. And an administrator may avoid a contract by showing the insanity of the testator at the time of making it. *Lazell v. Pinnick*, 1 Tyler, 247.—So insanity is a good defence to an action of slander, and evidence that the defendant was a weak-minded man, and at times both before and after the speaking of the words, totally deranged, is competent evidence in ascertaining whether he was insane at the time of speaking them. *Bryant v. Jackson*, 6 Humph. 199.—And it is no answer that the sane party when contracting was not apprised of the other's insanity, and did not suspect it, and did not overreach such insane person, or practice any fraud or unfairness upon him. *Seaver v. Phelps*, 11 Pick. 304. And the dictum of Lord Tenterden in *Brown v. Joddrell*, 1 Moody & Malkin, 105, to the contrary, is inconsistent with modern decisions.—Insanity is no defence to an action of trover. *Morse v. Crawford*, 17 Verm. R. 499.

(n) In *Pitt v. Smith*, 3 Camp. 33, Lord *Ellenborough* held that an agreement signed by an intoxicated man is void, on the ground that such a person

"has no agreeing mind." And he reasserted this rule in *Fenton v. Holloway*, 1 Stark. 126. See *Cooke v. Clayworth*, 18 Ves. 15; *Cole v. Robbins*, Bull. N. P. 172; *Barrett v. Buxton*, 2 Aikens, 167; *Burroughs v. Richmond*, 1 Green, 233; *Foot v. Tewksbury*, 2 Verm. 97; *Reynolds v. Waller*, 1 Wash. 164; *Reinicker v. Smith*, 2 Harr. & Johns. 421; *Curtis v. Hall*, 1 South. 361; *Rutherford v. Ruff*, 4 Desaus. 364; *Seymour v. Delaney*, 3 Cow. 445; *Duncan v. McCullough*, 4 S. & R. 484; *Taylor v. Patrick*, 1 Bibb, 168; *Prentice v. Achorn*, 2 Paige, 30; *Harrison v. Lemon*, 3 Blackf. 51; *Drummond v. Hopper*, 4 Harring. 327. And the legal representatives of a party contracting while intoxicated have the same right as the party himself to avoid such contract, although the drunkenness was not procured by the sober party. *Wiglesworth v. Steers*, 1 Hen. & Mun. 70. It seems to be held in equity that intoxication does not avoid a contract, unless the intoxication was produced by the other party, or unless fraud had been practised upon him. *Cory v. Cory*, 1 Ves. Sen. 19; *Johnson v. Medicott*, 3 P. Wms. 130, note; *Stockley v. Stockley*, 1 V. & B. 23; *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, Saxton, 346. Dealing with persons *non compos* raises a presumption of fraud; but it may be rebutted; and if the evidence of good faith and of benefit to the unsound person is clear, equity will not interfere. *Jones v. Perkins*, 5 B. Monroe, 225.—As to frauds on drunkards, see *Gregory v. Frazer*, 3 Camp. 454; *Brandon v. Old*, 3 C. & P. 440. Some of the above authorities certainly seem to be inconsistent with the principle, that a person in a state of intoxication has no agreeing mind, and therefore there never was a contract between the parties. We think this principle, however, the true one.

money. (o) And if the condition of lunacy be established by proper evidence under proper process, the representatives and guardians of the lunatic may avoid a contract entered into by him at a time when he is thus found to have been a lunatic, although he seemed to have his senses, and the party dealing with him did not know him to be of unsound mind. (p) But this rule has one important qualification, quite analogous to that which prevails in the case of an infant, and resting undoubtedly on a similar regard for the interests of the lunatic. This is, that his contract cannot be avoided, if *bonâ fide* on the part of the other party, and made for the procurement of necessities, (q) which, as in the case of infants, would not be restricted to absolute necessities, but such things as are useful to him, and proper for his means and station. And it has been recently held, that a *bonâ fide* contract made with a lunatic, who was apparently sane, cannot be rescinded by him or his representatives, unless the parties can be placed *in statu quo*. (r)

(o) See *Alderson, B.*, in *Gore v. Gibson*, 13 M. & W. 623. From *Sentance v. Poole*, 3 C. & P. 1, it might be inferred that an indorsement, made in a state of complete intoxication, would not be enforced against the drunkard by a *bonâ fide* holder without knowledge of the circumstances. Such a rule must rest on the assumption that the act was a nullity; but it is difficult to see how one could indorse a bill or note in such a way that its appearance would excite no suspicion, and yet be so drunk as to know nothing of what he was doing; and unless the indorser were utterly incapacitated, it should seem that a third party, taking the note innocently and for value, ought to hold it against him.

(p) *McCrillis v. Bartlett*, 8 N. Hamp. 569. See *Smith v. Spooner*, 3 Pick. 229; *Manson v. Felton*, 13 Pick. 206.

(q) *Richardson v. Strong*, 13 Ire. Law, 106; *Gore v. Gibson*, 13 M. & W. 627; *Niell v. Morley*, 9 Ves. 478; *McCrillis v. Bartlett*, 8 N. Hamp. 569. In *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170, 2 C. & P. 178, a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time

when the goods were ordered and supplied. It was held, that this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles not having any reason to suppose that the defendant was a lunatic. *Abbot, C. J.* "I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient to defeat the plaintiff's action. It was brought to recover their charges for things suited to the state and degree of the defendant, actually ordered and enjoyed by him. At the time when the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be that such contracts would bind, although I was not prepared to say that they would not."

(r) *Molton v. Camroux*, 12 Jur. 800,

The statutes of the different States provide that idiots, lunatics, drunkards, and all persons of unsound mind, may be put under guardianship. And the finding of a competent court of the fact of lunacy, and the appointment of a guardian, are held to be conclusive proof of such lunacy, and all subsequent contracts are void. (s) In England, an inquisition is only presumptive evidence as to third parties. (t) But it has

(1848.) S. C. 2 Exch. 487. In error 4 Exch. 17. See also *Neill v. Morley*, 9 Ves. 478; *Price v. Berrington*, 7 E. L. & E. 254; *Fitzhugh v. Wilcox*, 12 Barb. 235. In *Dane v. Kirkwall*, 8 C. & P. 679, it was *held*, that to constitute a defence to an action for use and occupation of a house taken by the defendant under a written agreement, at a stipulated sum per annum, it is not enough to show that the defendant is a lunatic, and that the house was unnecessary for her; but it must be also shown that the plaintiff knew this, and took advantage of the defendant's situation; and if that be shown, the jury should find for the defendant; and they cannot, on these facts, find a verdict for the plaintiff for any smaller sum than that specified in the agreement.

(s) *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169. *Contrà* in Pennsylvania, *In re Gangwere's Estate*, 14 Penn. 417. In *Leonard v. Leonard*, 14 Pick. 280, the court said:—"It is suggested, on the part of the defendant, that an inquisition of lunacy in England is not conclusive on the question of sanity; but it is a sufficient answer, that such an inquisition is very different from the proceedings in a court of probate under our statute. The plaintiff insists that the guardianship is conclusive of the disability of the ward, in relation to all subjects on which the guardian can act, and that the only mode of preventing this operation is by procuring the guardianship to be set aside. And there can be no question but that the judge of probate has power to reconsider the subject, and if it shall appear that the cause for the appointment of a guardian has ceased, or that the guardian is an improper person for the office, the letter of guardianship may be revoked. *McDonald v. Morton*, 1 Mass. R. 543. In the case of *White v. Palmer*, 4 Mass.

R. 147, it was *held* that the letter of guardianship was competent evidence of the insanity of the ward, and the reasoning tends to show that it is conclusive; but this was not the question then before the court. If this were not the general principle of the law, the situation of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust. In every action he might be obliged to go before the jury upon the question of sanity, and one jury might find one way, and another another. We are of opinion that as to most subjects the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian cannot do for him. But the transaction now in question falls within the general rule." So proceedings in a court of equity, establishing the lunacy of a party, are admissible to prove the lunacy in an action at law, against third persons not a party to the proceedings in equity. *McCreight v. Aiken*, 1 Rice, 56. And creditors of an obligor to a bond, if not interested in the result, are competent witnesses to prove the obligor's lunacy. *Hart v. Deamer*, 6 Wend. 497. And to prove a party's lunacy at the time of making a contract, evidence of the state of his mind *before*, at, and *after* such time is admissible. *Grant v. Thompson*, 4 Conn. 203. Although the mere opinion of witnesses not medical men, relative to the sanity of a party, are not admissible, yet their opinions, in connection with the facts upon which they are founded, may be. *Grant v. Thompson*, 4 Conn. 203; *McCurry v. Hooper*, 12 Ala. 823.

(t) *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126. And the

been held, that even where the statute expressly declares all the contracts of a lunatic under guardianship void, or disables him from entering into contracts, it is not the purpose nor effect of such provision to annul his contract for necessities, if made with good faith by the other party, and under circumstances which justify the contract; (*u*) and if a lunatic be sued, or a claim is made upon him, perhaps any person, though not expressly authorized, may in his case, as in that of an infant, make, in good faith, a legal tender for him, which shall enure for his benefit.

Courts of law, as well as equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but cannot distinguish between degrees of intelligence. Against the consequence of mere imprudence, folly, or that deficiency of intellect which makes mistake easy, but does not amount to unsound or disordered intellect, even equity gives no relief, unless another party has made use of this want of intelligence to do a positive wrongful act. (*v*)

In this country, where provision is made by statute that persons of unsound mind may be put under guardianship, this may be done upon a representation and request, either of the authorities of the town in which he resides, or of his friends or relatives, and after proper inquiry into the facts, and into the evidence and character of the insanity. The guardian so appointed gives bonds for the due management and care of the estate and person of the insane. He then is put in possession of the estate of his ward, and has the general disposition and control of it.

Similar provisions are often made with respect to

SECTION II.

SPENDTHRIFTS.

In regard to these persons, the appointment of a guardian, and the depriving them of all power over their own property,

same rule was recognized in *Hart v. Deamer*, 6 Wend. 497. See also *Hopson v. Boyd*, 6 B. Monroe, 296.

(*u*) *McCrillis v. Bartlett*, 8 N. H. 569.

(*v*) *Osmond v. Fitzroy*, 3 P. Wms. 129; 1 Fonbl. Eq. 5th ed. 66; *Lewis v. Pead*, 1 Ves. Jr. 19.

is generally put on the ground of a danger that they may become chargeable to the town or other body corporate who will be bound to support them if they become paupers. The application must come, therefore, from the authorities of such town; and set forth that the party, by drinking, gaming, or other debauchery, is so spending and wasting his means as to be in danger of becoming chargeable. Here also there is to be a judicial inquiry into the facts, after due notice to the alleged spendthrift; and upon a finding of the facts in accordance with the petition, a guardian is appointed as before, and after such appointment all contracts of the spendthrift, except for necessities, are void. Where a provision is made for recording such complaint and petition in a public registry, no valid contract, excepting as before for necessities, can be made by the spendthrift, after such record, provided a guardian be subsequently appointed on the petition. (*w*) And it has been held that the acknowledgment or new promise of a spendthrift under guardianship is not sufficient to take a former promise out of the statute of limitations. (*x*)

(*w*) It was held in *Smith v. Spooner*, 3 Pick. 229, that the Massachusetts statute of 1818, c. 60, which, in case a guardian shall be appointed to a spendthrift, avoids "every gift, bargain, sale, or transfer of any real or personal estate," made by the spendthrift after the complaint of the selectmen to the judge of probate, and the order of notice thereon shall have been filed in the registry of deeds, does not apply to promissory notes. But this case is explained by *Shaw, C. J.*, in *Manson v. Felton*, 13 Pick. 208, as depending wholly upon the construction of the statute of 1818.

(*x*) In *Manson v. Felton*, 13 Pick. 206, *Shaw, C. J.*, said:—"The question, then, is, whether a spendthrift, under guardianship, is competent to make a valid contract for the payment of money. The plaintiff relies upon *Smith v. Spooner*, 3 Pick. 229, as decisive. But we think that that case turns upon a very different principle. That action was brought upon a note executed after a complaint made by the selectmen, and before the actual appointment of a guardian. It depended, therefore, wholly upon the construction of the statute

of 1818, providing that after such complaint made, and a copy filed with the register of deeds, every gift, bargain, sale, or transfer of real or personal estate, shall be void. It was decided on the ground that before the actual appointment of a guardian there was no disability to make contracts, except the specific disability created by the statute; that such a disability ought not to be extended by construction, being in derogation of a general right and power of persons over their own property; and that the making of a promissory note was not a gift, sale, or transfer of property within the meaning of the act. It is to be remarked that the disability created by this act is to take effect upon a mere complaint, before any adjudication, or even inquiry into the truth of the facts charged, and before the appointment of a responsible officer competent and bound to take charge of the property, and provide for the wants of the spendthrift and those dependent on him. These considerations form a marked distinction between the case of an actual adjudication, conclusively fixing the disability contemplated by

SECTION III.

SEAMEN.

The reckless and improvident habits of seamen, and their inability to protect themselves against the various parties with whom they deal, have induced courts both of law and equity to extend to them a certain kind of disability for their protection; that is, certain contracts with seamen, taking away their rights, or laying them under wrongful obligations, are annulled. A number of statutes have been enacted both in England and in this country in relation to the shipping articles, as they are termed, or the contracts by which seamen engage their services for a voyage. The Act by which this subject is principally governed at this time is that of 1813, ch. 2. And it has been very distinctly decided that any stipulations in shipping articles, which derogate from the general rights and privileges of seamen, will be held void in admiralty, and to a certain extent at common law, unless it shall be made apparent by proof on the part of the owner that the nature and effect of such stipulations were explained to and understood by the seaman, and an additional compensation allowed him, fully adequate to all that he lost by the stipulation. (y) In the case of *The Juliana*, referred to by

the statute, and appointing a guardian to act in place of the person disabled, and the limited and temporary restraint established by the statute of 1818, on the construction of which the case of *Smith v. Spooner* was decided. But there are several expressions in the opinion of the court, in that case, implying a distinction in their minds between the case of a person actually under guardianship, and that of a person in relation to whom the incipient measures have been taken to establish such a guardianship. The court speak of the note, made after complaint filed, but before the appointment of a guardian, as a note made "on the eve of a disability to contract." And the closing remarks in the opinion of the Chief Justice strongly imply the same con-

clusion. *Shearman v. Akins*, 4 Pick. 283. And see *Pittam v. Foster*, 1 B. & C. 248; *Ward v. Hunter*, 6 Taunt. 210;

(y) *Brown v. Lull*, 2 Sumner, 444; *Harden v. Gordon*, 2 Mason, 541; 3 Kent's Com. 193; *The Juliana*, 2 Dodson, 504. In *Brown v. Lull*, *supra*, *Story, J.*, speaking of the effect of a stipulation in the shipping articles, which in that case was relied upon as controlling the right of the seaman to wages, said:—"It is well known that the shipping articles, in their common form, are in perfect coincidence with the general principles of the maritime law as to seamen's wages. It is equally well known that courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from these principles in the articles, as injurious to

Judge *Story* in *Harden v. Gordon*, the true doctrine on this subject is set forth by Lord *Stowell* with great clearness and force. The general principle in all these decisions is, that where a man has made a promise to one who has taken a wrongful advantage of his circumstances or his necessities, he shall not be bound by such promise. And the same principle has been enforced against seamen; as where in the

the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. Seamen are a class of persons remarkable for their rashness, thoughtlessness, and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned. Courts of admiralty are not by their constitution and jurisdiction confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity, and in short, so far as their powers extend, they act as courts of equity. Whenever, therefore, any stipulation is found in the shipping articles which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition, or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur; first, that the

nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby. This doctrine was fully expounded by Lord *Stowell*, in his admirable judgment in the case of *The Juliana*, (2 Dods. R. 504); and it was much considered by this court in the case of *Harden v. Gordon*, (2 Mason, R. 541, 556, 557); and it has received the high sanction of Mr. Chancellor Kent in his Commentaries, (iii. § 40, p. 193.) I know not, indeed, that this doctrine has ever been broken in upon in courts of admiralty or in courts of equity. The latter courts are accustomed to apply it to classes of cases, far more extensive in their reach and operation; to cases of young heirs selling their expectancies; to cases of reversionsers and remainder-men dealing with their estates; and to cases of wards dealing with their guardians; and above all to cases of seamen dealing with their prize-money and other interests. If courts of law have felt themselves bound down to a more limited exercise of jurisdiction, as it seems from the cases of *Appleby v. Dodd*, (8 East. 300,) and *Jesse v. Roy*, (1 Crompt. Jerv. & Rose. R. 316, 329, 339,) that they are, it is not that they are insensible of the justice and importance of these considerations, but because they are restrained from applying them by the more strict rules of the jurisprudence of the common law, which they are called upon to administer." In the case of *The Betsy & Rhoda*. in the District Court of Maine, (3 N. Y. Legal Observer, 215,) it was held that a negotiable note taken by a seaman for wages will not extinguish his claim for wages, nor his lien on the ship, unless he be informed of this effect, and have additional security given him by way of compensation.

course of a voyage they compelled the master to make a new contract with them for higher wages, by threats of desertion. (z) And contracts made with pilots or salvors, under circumstances of necessity, for exorbitant or unjust compensation, have been set aside on the same principle. But, in general, contracts respecting the wages of seamen will be construed liberally in their favor, in all cases where there may be room for such construction. As where by the usual clause no seaman was entitled to his wages, or any part thereof, *until the arrival* of the ship at the port of discharge, the words italicized are not construed as a condition precedent, but only as determining the time and place of payment. (a)

(z) *Bartlett v. Wyman*, 14 Johns. 261. In this case the court said that the new contract made by the master was not binding on him, because made "in contravention of the policy of the Act of Congress of the 20th July, 1790. This statute requires, under a penalty, every master of a ship or vessel, bound from a port in the United States to any foreign port, before he proceeds on the voyage, to make an agreement in writing or print with every seaman or mariner or board, with the exception of apprentices or servants, declaring the voyage, and term of time for which the seaman or mariner shall be shipped. In the present case this was done, and the rate of wages fixed at seventeen dollars per month for the whole voyage. To allow the seamen, at an intermediate port, to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract, thus extorted, binding on the master of the ship, would be not only against the plain intention of the statute, but would be holding out encouragement to a violation of duty, as well as of contract. The statute protects the mariner, and guards his rights in all essential points; and to put the master at the mercy of the crew takes away all reciprocity."

(a) *Swift v. Clark*, 15 Mass. 173; *Johnson v. Sims*, 1 Pet. Ad. 215. And in *The George Home*, 1 Hagg. Ad. 370, on an engagement to go "from London

to Batavia, the East India seas or elsewhere, and until the final arrival at any port or ports in Europe." It was held, that upon the arrival of the ship at Cowes for orders, (as previously agreed between the owners and master,) the seamen were not bound to proceed on a further voyage to Rotterdam. But in *Webb v. Duckingfield*, 13 Johns. 391, where a seaman who had signed shipping articles, by which he engaged not to absent himself from the vessel without leave, "until the voyage was ended, and the vessel was discharged of her cargo," on the vessel's arriving at her last port of discharge, and being there safely moored, refused to remain and assist in discharging the cargo, but absented himself without leave; it was held that by such desertion he had forfeited his wages.—So mutinous and rebellious conduct of the mariners, if persisted in, forfeits their right to wages. *Relf v. Ship Maria*, 1 Pet. Ad. 186.—So does desertion; and the statute of the United States, declaring any unauthorized absence of a seaman from his ship for forty-eight hours to be desertion, applies to all cases where the seaman does not return within such time, although he may have been prevented by the sailing of the ship. For the ship is not bound to wait for him, but he is bound to rejoin the ship within that period, *suo periculo*. *Coffin v. Jenkins*, 3 Story, 108.

SECTION IV.

PERSONS UNDER DURESS.

A contract made by a party under compulsion is void; because *consent* is of the essence of a contract, and where there is compulsion there is no consent, for this must be voluntary. (b) Such a contract is void for another reason. It is founded on wrong. The violence was itself an injury to the party suffering it; the party using the violence had no right to do so, and cannot establish a right on his own wrong-doing.

It is not, however, all compulsion which has this effect; it must amount to *durities*, or duress. But this duress may be either actual violence, or threat. (c) And actual violence, if not so slight as to be quite unimportant, is sufficient to annul a contract made under its influence. Imprisonment, in a common gaol or elsewhere, is duress of this kind; but to have this effect it must either be unlawful in itself, or, if lawful, then it must be accompanied with such circumstances of unnecessary pain, privation, or danger, that the party is induced by them to make the contract. (d)

(b) 1 Rol. Abr. 688.

(c) 1 Bl. Com. 131.

(d) *Watkins v. Baird*, 6 Mass. 511; *Richardson v. Duncan*, 3 New Hamp. 508; *Stouffer v. Latshaw*, 2 Watts, 167; *Nelson v. Suddarth*, 1 Hen. & Munf. 350.—An arrest, though for a just cause, and under lawful authority, yet if it be for an unlawful purpose, is duress of imprisonment. *Severance v. Kimball*, 8 New Hamp. 386.—In *Watkins v. Baird*, *supra*, *Parsons*, C. J., observed:—"It is a general rule that imprisonment by order of law is not duress; but, to constitute duress by imprisonment, either the imprisonment or the duress after must be tortious and unlawful. If, therefore, a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily executed a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, al-

though, in fact, the plaintiff had no cause of action. And although the imprisonment be lawful, yet unless the deed be made freely and voluntarily, it may be avoided by duress. And if the imprisonment be originally lawful, yet, if the party obtaining the deed detain the prisoner in prison unlawfully by covin with the jailer, this is a duress which will avoid the deed. But when the imprisonment is unlawful, although by color of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment. In *Allen*, 92, debt was sued on a bond, and duress of imprisonment pleaded in bar. The plaintiff had, on charging the defendant with felony in stealing a horse, procured a warrant from a justice, on which the defendant was arrested and imprisoned, and sealed the bond to the plaintiff to obtain his discharge,

Duress by threats exists not wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong; as of death, or great bodily injury, or unlawful imprisonment. It is a rule of law, which is applied to many cases, that where the threat is of an injury for which full and entirely adequate compensation may be expected from the law, such duress will not, of itself, avoid a contract, for the threatened person ought to have sufficient resolution to resist the threat and rely upon the law; as where the threat is of an injury to property, or of a slight injury to the person. (e) But no ver-

which was done, the horse appearing to be his own horse. *Roll, J.*, directed the jury that the proceedings being had to cover the deceit, the bond was obtained by duress. And, in our opinion it is a sound and correct principle of law, when a man shall falsely, maliciously, and without probable cause, sue out a process, in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful, as to the party procuring it; and he is answerable in damages for the tort, in an action for a false and malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud. And although *Bridgman*, in *Lev. 68, 69*, is made to say that imprisonment in custody of law by the king's writ will not be duress to avoid a deed, when the arrest is without cause of action, because the party has his remedy by action of the case, yet this must be a mistake, as there is no remedy by action for suing a groundless suit, unless the suit be without probable cause, and malicious. And if it be, certainly the imprisonment is wrongful, as to the party who maliciously procured it."—In *Richardson v. Duncan*, 3 New Hamp. 508, it was held that where there is an arrest for improper purposes, without just cause, or an arrest for just cause, but without lawful authority, or an arrest for a just cause, and under lawful authority, for an improper purpose, and the person arrested pays money for his enlargement, he may be considered as having paid the money by duress of

imprisonment, and may recover it back in an action for money had and received.—But an agreement by a prisoner to pay a just debt, made while under legal imprisonment, cannot be avoided on the ground of duress. *Shephard v. Watrous*, 3 Caines, 166; *Crowell v. Gleason*, 1 Fairf. 325; *Meek v. Atkinson*, 1 Bailey, 84.—But a bond given for the maintenance of a bastard child, as required by some statute, is void for duress, if the warrant and other proceedings before the magistrate are not according to the statute. *Fisher v. Shattuck*, 17 Pick. 252.—So a bond executed through fear of unlawful imprisonment may be avoided on account of duress. *Whitefield v. Longfellow*, 13 Maine, 146.—But *contrà*, as to a mortgage given as security for payment of a sum to the county, as the condition of a pardon. *Rood v. Winslow*, 2 Doug. (Mich.) 68.—A threat by a judgment creditor to levy his execution is not such duress as to make void an agreement to pay the sum due. *Wilcox v. Howland*, 23 Pick. 167; *Waller v. Cralle*, 8 B. Monroe, 11.—Nor a threat of lawful imprisonment. *Eddy v. Herin*, 17 Maine, 338; *Alexander v. Pierce*, 10 New Hamp. 497.—And a note given to obtain the release of property from an illegal levy of an execution is not void. *Bingham v. Sessions*, 6 Sm. & Mar. 13.

(e) *Atlee v. Backhouse*, 3 M. & W. 642; *Sumner v. Ferryman*, 11 Mod. 201; *Astley v. Reynolds*, Strange, 915. It is on this ground, perhaps, that in England duress of one's property is not sufficient to avoid a contract. *Atlee v. Backhouse*, 3 M. & W. 650, where *Parke, B.*, said:—"There is no doubt

dict could compensate adequately for loss of limb, or for great personal violence, and no man shall be held bound to incur such a danger. These distinctions, however, would not now probably have a controlling power in this country; but where the threat, whether of mischief to the person or the property, or to the good name, was of sufficient importance

of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, although there is some case in Viner's Abridgment, *Duress*, (B.) 3, to the contrary, that in order to avoid a contract by reason of *duress*, it must be *duress* of a man's person, not of his goods; and it is so laid down in Sheppard's Touchstone, (p. 61); but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of *duress* or constraint may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money and to receive them back, that cannot be avoided on the ground of *duress*." *Skeate v. Beale*, 11 Ad. & El. 933. In this case Lord Denman, C. J., said:—"We consider the law to be clear, and founded on good reason, that an agreement is not void because made under *duress* of goods. There is no distinction in this respect between a deed and an agreement not under seal; and, with regard to the former, the law is laid down in 2 Inst. 483, and Sheppard's Touchstone, 61, and the distinction pointed out between *duress* of or menace to the person, and *duress* of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert." In this country, however, it has

been held that *duress* of goods would under some circumstances avoid a man's note or bond. *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211. In this last case the law was thus laid down by the court:—"So cautiously does the law watch over all contracts that it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or *refuse such contracts*, and that not only with respect to *their persons*, but in regard to *their goods and chattels also*. Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void. . . . So, in like manner, *duress* of goods will avoid a contract, where an unjust and unreasonable advantage is taken of a man's necessities, by getting his goods into his possession, and there is no other *speedy means left* of getting them back again but by giving a note or a bond, or where a man's necessities may be so great as not to admit of the ordinary process of law, to afford him relief, as was determined in this court after solemn argument, in the case of *Sasportas v. Jennings*, 1 Bay, 470; also in the case of *Astley v. Reynolds*, Strange, 915." See also *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *Foshay v. Ferguson*, 5 Hill, 158, where *Bronson, J.*, said:—"I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of *duress*. There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrongdoer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction."—Although in England a contract may not be avoided for *duress* of goods, yet money paid under such *duress* may be recovered back. See *Oates v. Hudson*, 5 E. L. & E. 469, and note.

to destroy the threatened party's freedom, the law would not enforce any contract which he might be induced by such means to make. And where there has been no actual contract, but money has been extorted by duress, under circumstances which give to the transaction the character of a payment by compulsion, it may be recovered back. (f)

A contract made under duress is not, however, void, but only voidable; and it may be ratified and affirmed by the party upon whom the duress was practised. (g)

(f) *Chase v. Dwinal*, 7 Greenl. 134; *Oates v. Hodson*, 5 E. L. & E. 469, and note. But where a person has paid the amount of taxes assessed upon him, he cannot recover it back, upon the ground that the assessment was illegally made, if there be no proof that he was compelled to pay any portion thereof by duress of his person or seizure of his property, or that any part was paid under protest, and to avoid such arrest or seizure. The mere fact that the taxes were paid to collectors, who had warrants for the collection, affords no satisfactory proof of payment by duress. *Smith v. Readfield*, 27 Maine, 145.

(g) *Shep. Touch.* 62, 288. The pri-

vilage of avoiding a contract for reason of duress is personal, and none can take advantage of it but the party himself. *Huscombe v. Standing*, Cro. Jac. 187; *Baylie v. Clare*, 2 Brownl. 276; *McClintick v. Cummins*, 3 McLean, 158. Perhaps, however, this privilege extends to sureties. It was so held, in *Fisher v. Shattuck*, 17 Pick. 252. But the contrary was expressly adjudged in *Huscombe v. Standing*, Cro. Jac. 187. See also *McClintick v. Cummins*, 3 McLean, 158. In this case it is said that the father and son may each avoid his obligation by duress of the other; and so a husband by duress of his wife. See also *Bac. Abr. Duress*, (B.)

CHAPTER XX.

ALIENS.

AN alien, by the definition of the common law, is a person born out of the jurisdiction and allegiance of this country, excepting only the children of public ministers abroad, whose wives are American women. But the statute of 29th January, 1795, declared that "the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States." The statute of the 14th April, 1802, is more obscure on this subject, and is regarded by high authority (*h*) as leaving this question in some doubt. We do not believe that the courts of this country would apply to this question those principles of the common law of England which oppose the provision of the statute of 1795. This cannot, however, be regarded as certain, until it be settled by competent adjudication or statutory provision.

At common law an alien cannot acquire title to real pro-

(*h*) Chancellor Kent says, 2 Comm. 52 : — "It [this statute] applied only to the children of persons who *then were or had been* citizens; and consequently the benefit of this provision narrows rapidly by the lapse of time; and the period will soon arrive when there will be no statutory regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. . . . But the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective, in being confined to the case of children of parents who were citizens in 1802, or had been so previously. The former

act of January 29th, 1795, was not so; for it declared generally that 'the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States.' And when we consider the universal propensity to travel, the liberal intercourse between nations, the extent of commercial enterprise, and the genius and spirit of our municipal institutions, it is quite surprising that the rights of the children of American citizens, born abroad, should by the existing act of 1802, be left so precarious, and so far inferior in the security which had been given in like circumstances by the English statutes."

perty by descent, nor by grant, nor by operation of law. Nor can he give good title by grant; nor can he transmit good title to his heir. (*i*) If an alien take land by purchase, he may hold until office found, and may bring an action for the recovery of possession; (*j*) but if he die, the land passes at once to the State, without any inquest of office. (*k*) But the severity of these rules has been very much mitigated in this country, somewhat by adjudication, but more by the various statutes of the States, in many of which, and in the constitutions of some, there are provisions modifying the principles of the common law relative to aliens. (*l*)

In respect to personal property, and the various contracts in relation to it, and the obligations which these contracts impose upon him, and the remedies to which he may resort for breach of them, the alien stands very much upon the same footing as the citizen. An alien resident within a State is entitled to the benefit of the insolvent laws. (*m*) And in the recent interesting cases respecting trademarks, it has been determined that he is entitled to the same protection as our citizens. (*n*) The right to confiscate the debts and property of alien enemies is declared to exist in Congress, by the highest judicial authority; (*o*) but the exercise of this right, it may well be hoped, will never be attempted. (*p*) But even alien enemies residing in this country may sue and be sued as in time of peace, on the ground that their residence is lawful until they are ordered away by competent authority, and this residence gives them a right

(*i*) Calvin's case, 7 Co. 25 a; Col-
lingwood v. Pace, 1 Vent. 417; Jack-
son v. Lunn, 3 Johns. Cas. 109; Levy
v. McCartee, 6 Pet. 102; Jackson v.
Green, 7 Wend. 333; Jackson v. Fitz-
simmons, 10 Wend. 1.

(*j*) Waugh v. Riley, 8 Met. 295.

(*k*) Co. Lit. 2, b; Willon v. Berk-
ley, Plowd. 229 b, 230 a; Fox v.
Southack, 12 Mass. 143; Fairfax v.
Hunter, 7 Cranch. 619; Orr v. Hodg-
son, 4 Wheat. 453. See also Wilbur
v. Tobey, 16 Pick. 179; Foss v.
Crisp, 20 Id. 124; People v. Conklin,
2 Hill, 67; Banks v. Walker, 3 Barb.
Ch. 438.

(*l*) This subject is very fully con-
sidered, and presented with great clear-
ness, and an abundant illustration, in 2
Kent's Comm. sect. 25.

(*m*) Judd v. Lawrence, 1 Cush. 531.

(*n*) Coats v. Holbrook, 2 Sandf. Ch.
586; Taylor v. Carpenter, Id. 603, 3
Story, 458; 2 W. & M. 1; 11 Paige,
292.

(*o*) Brown v. United States, 8 Cranch,
110; The Adventure, Id. 228, 229;
Ware v. Hylton, 3 Dallas, 199.

(*p*) A very powerful argument against
the right itself was made by Alexander
Hamilton, in his letters signed Camil-
lus, published in 1795.

to protection. (*q*) During this residence the alien is equally bound with the citizen to obey all the laws of the country which do not apply specifically and exclusively to citizens.

(*q*) *Wells v. Williams*, 1 *Ld. Raym.* Rep. 462; *Clarke v. Morey*, 10 *Johns.* 282; *Daubigny v. Davallon*, 2 *Anst.* 69; *Russell v. Skipwith*, 6 *Binn.* 241.

CHAPTER XXI.

SLAVES.

Sect. I.—*Nature of the Relation of Master and Slave.*

No great success seems to have attended the efforts that have been made to ascertain the nature and incidents of slavery, as it exists in this country, by referring to the feudal law or the civil law. Little as we know of villeins and their legal rights, enough is found in the books to show that their condition differed in very important particulars from that of negro slaves. And although there is doubtless more similarity to be recognized in the slavery of the ancients, it is certain that the authority of the American master, by law as well as usage, is many degrees short of that despotic power with which his Roman prototype was invested. On the whole, it is apprehended that African slavery in America is so far *sui generis* that in general we have to look to the letter of the statute-book, and to actual and existing usage, both for its essential qualities, and the peculiar rules by which the questions to which it gives rise are to be determined. (r)

As slavery is in derogation of natural right, and exists only by positive institution, the courts of this country, actuated by the spirit of the common law, have always been disposed to apply the maxim, *Jura in omni casu libertati dant favorem.* (s) And of this inclination we shall have occasion to

(r) Neal v. Farmer, 9 Georgia, 553. As to the nature of slavery, see Maria v. Sarbaugh, 2 Rand. 228; Hudgins v. Wright, 1 H. & Munf. 139; Commonwealth v. Turner, 5 Rand. 678; Seville v. Chretien, 5 Mart. 275; Bynum v. Bostick, 4 Desaus. 267; Jarman v. Patterson, 7 Monr. 645; Fields v. The State, 1 Yerg. 156. — Respecting

the condition of slaves in Massachusetts before the Revolution, see Winchendon v. Hatfield, 4 Mass. 123.

(s) Co. Litt. 124 b, citing from the eloquent passage in Fortescue, (cap. 42.) "Ab homine et pro vitio introducta est Servitus. Sed Libertas a Deo hominis est indita Naturæ. Quare ipsa ab Homine sublata, semper redire glis-

see many examples. But while it can never cease to be true that the law favors liberty, there are limits to the operation of this as of all other maxims. (*t*) And when the fact of slavery is clear, the nature of the relation of master and slave admits of no modification; nor will courts either of law or equity lend aid to the attempts of individuals to ingraft upon it new and incongruous features. A slave cannot become partially free. The law recognizes only freedom on the one side and slavery on the other; and there is no intermediate *status*. (*u*) Where a negro girl was given by will, on the terms that she was to be held not as a bound slave, but under the care and tuition of the legatee, with an allowance of wages; and that her children, if she had any, were to come under the same regulation after they paid for their raising—their labor to be equally divided amongst all the testator's children, if they chose to employ them, the bequest was adjudged void. (*v*) So, on the other hand, where a deed emancipating a female slave contained a reservation to the master and his heirs of an absolute right to all her after-born children, it was held that such reservation was void, and that both the woman and her children were unconditionally free. (*w*) If partial payments have been made to the owner of a slave for the purpose of buying his freedom, the owner continues entitled to all the services of the slave, with full power of alienation; and one who purchases from him, on condition to emancipate on receipt of the residue of the slave's value, is entitled to all the slave's services until payment of such residue. (*x*)

cit, ut facit omne quod Libertate naturali privatur. Quo ipse et crudelis judicandus est qui Libertati non favet. Hæc considerantia Angliæ Jura in omni casu Libertati dant Favorem."

(*t*) The maxim in the Roman law, (cited by *Green, J.*, in *Isaac v. West*, 6 Rand. 652,) is, *In obscura voluntate manumittentis favendum est libertati*. And the following reasonable observations were made by *Mathews, J.*, in *Cuffy v. Castillon*, 5 Mart. 496:—"As to the rule requiring the interpretation in doubtful cases to be in favor of freedom, it is sufficient to observe that no one rule of interpretation in law or con-

tracts ought ever to be considered of so much consequence as to exclude the operation of others, equally founded in justice and common sense. Freedom must not be so favored by interpretation as to depart entirely from the intention of the contracting parties, apparent on the contract itself."

(*u*) See *Maria v. Surbaugh*, 2 Rand. 228.

(*v*) *Wynn v. Carrell*, 2 Grat. 227. And for another fruitless attempt of the kind see *Rucker's Adm'r v. Gilbert*, 3 Leigh, 8.

(*w*) *Fulton v. Shaw*, 4 Rand. 597.

(*x*) *François v. Lobrano*, 10 Rob.

It is a well established principle that *partus sequitur ventrem*. The *status* of the mother is the *status* of her children.

SECTION II.

ACTION FOR FREEDOM.

For the trial of the question of freedom various forms of action are employed; for example, trespass and false imprisonment, (*y*) an action on the case in the nature of ravishment of ward, (*z*) and a special proceeding upon petition. In all the cases in the books it seems that a wide indulgence is granted to the claimant, and the court will not suffer him to be defeated by an omission of formalities of procedure. When an action is begun, to try the plaintiff's right to freedom, the court will interfere, upon cause shown, to compel the defendant to have him forthcoming on the day of trial, and in the mean time to treat him with humanity, and to allow him reasonable opportunity to procure evidence; (*a*) and this last privilege has been extended so far as to require the defendant, where (pending the original action) a strong case was made out for the plaintiff upon a *habeas corpus*, to give security to leave the plaintiff at liberty until the next term to go whither he pleased in order to procure testimony. (*b*) And the Supreme Court of Louisiana, where the pleadings, documents, and evidence in a cause, as brought before them on exceptions, disclosed no ground for the assertion of freedom, said they were not thereby bound, but would notice facts *de hors* the record; and such extrinsic facts sug-

(La.) 450.—The Roman law, which declares that although a slave do not pay the whole price of his freedom, he is yet entitled thereto, if he afterwards make up the deficiency by his labor, is held in Louisiana to apply only to such as are made free *instantane*, on condition of paying a further sum *in futuro*, not to those whom the master promises to free when such further sum shall be paid. *Cuffy v. Castillon*, 5 Mart. 496.

(*y*) *Evans v. Kennedy*, 1 Hayw. (N. C.) 422.

(*z*) *Clifton v. Phillips*, 1 McCord, 469.

(*a*) See *Gober v. Gober*, 2 Hayw. (N. C.) 127; *Evans v. Kennedy*, 1 Hayw. (N. C.) 422; *Parker v. —*, 2 Hayw. (N. C.) 345.

(*b*) *Parker v. —*, 2 Hayw. (N. C.) 345.

gesting a new question, the cause was remanded for its trial. (c)

*The issue always is upon the plaintiff, or petitioner's right to freedom against all the world. (d) The *jus tertii* is regarded as a complete bar to his claim, and it is not sufficient for him to show a want of title in the party in possession.

No presumption of slavery arises against a party asserting his freedom, from the length of time, however great, that he and his ancestors have been held in slavery. (e) If a person held as a slave can show that his ancestor in the female line, no matter how many degrees removed, was *de jure* a free woman, he may vindicate at law his own right to freedom. (f) On the other hand, when a slave, with the knowledge of his owner, has gone at large, and acted as if free, for any considerable length of time, a jury may be directed to presume that a deed of manumission was executed with

(c) *Marie Louise v. Marot*, 8 Louis. R. 475. This was an action claiming the emancipation of the plaintiff's daughter Josephine, a mulattress, aged twenty years. It appeared that the owner of the girl made a donation of her, when two years old, to the defendant, at that time a minor and a female, upon condition that she should be emancipated at the age of thirty years; and this donation was accepted by the agency of the defendant's father: it also appeared that a few days after the donation the father executed a declaration in writing, attested by two witnesses, stating that the intention of the parties to the deed was that the slave given should be liberated at the age of twenty years, and not thirty as expressed in the donation. The verdict of the jury being for the plaintiff, it was held unauthorized upon the case as stated, since the father after accepting the donation in behalf of the defendant was *functus officio*, and no act or declaration by him afterwards could affect the donee. But the court said, per *Mathews, J.*:—"The case is peculiar in its nature—a claim for liberty! . . . It is an action brought to redeem a helpless female from slavery; and every thing which may properly be done in *favorem libertatis* should be done, even to notice facts

de hors the record. It was stated at the bar, and not denied, that the person now claiming her immediate emancipation was taken by her owners to France, a country whose institutions do not tolerate slavery or involuntary servitude in any manner, and was placed by them under the direction of a hairdresser, to learn his art. Did she not become free in France? Being brought from a foreign country into the United States, is she not free, according to the provisions of laws enacted by Congress? These are questions which we will not now solve; but we deem it proper to remand the cause, in order that they may be put in a train for solution." The cause was afterwards tried before a jury upon a supplemental petition setting out the new facts above alluded to, and a verdict being rendered for the plaintiff, the judgment was affirmed on appeal. See *Marie Louise v. Marot*, 9 Louis. R. 473.

(d) *Harriett v. Ridgely*, 9 G. & Johns. 174; *Cross v. Black*, 9 G. & Johns. 198; *Berard v. Berard*, 9 Louis. R. 158; *Trudeau v. Robinette*, 4 Mart. 577.

(e) *Butler v. Craig*, 2 H. & McH. 216; 236.

(f) *Rawlings v. Boston*, 3 H. & McH. 139.

all required formalities, and if it would be invalid unless recorded within a certain time, that it was so recorded. (*g*)

There is a presumption against every *negro*, in an action * for his freedom, that he is a slave. (*h*) But in Delaware where the number of free blacks is much greater than that of the slaves, as a mere presumption the inclination is in favor of freedom. (*hh*) And in an action by a negro against a third person, not claiming to be his master, the presumption is the other way, and there the burden of proving the fact of his slavery is on the party making the allegation in bar of his action. (*i*) The presumption that negroes are slaves has been held to be confined strictly to negroes; there is no such legal presumption of slavery in the case of persons of any shade of color intermediate between black and white. (*j*)

Even a *negro* will be presumed free, though purchased as a slave, if the purchase was made within a country whose laws do not tolerate slavery, unless it be shown that he was before in one where slavery is tolerated. (*k*) And it seems the courts of any State will take judicial notice that another State disallows slavery. At all events it would appear that

¹(*g*) *Burke v. Negro Joe*, 6 G. & Johns. 136.

(*h*) *Davis v. Curry*, 2 Bibb, 238; *Adelle v. Beauregard*, 1 Mart. 183. This presumption, it seems, also holds where the action is not a claim of freedom by the negro, but a penal action by his master against a third party upon a statute forbidding certain dealings with slaves. *Delery v. Mornet*, 11 Mart. 4, 10. There *Martin, J.*, said:—"Nothing can be clearer than the position that a person who, in this State, deals with a black man, exposes himself in case of his being a slave to all the consequences which follow the dealing with a slave; the presumption being that a black man is a slave; as by far the greatest proportion of persons of that color are, in this State, held in slavery." See *Hoffman v. Gold*, 8 G. & Johns. 79; *Jackson v. Bridges*, 1 Rob. (Louis.) 172.

(*hh*) *State v. Jeans*, 4 Harring. 570.

(*i*) *Hawkins v. Vanwickle*, 6 Mart. N. S. 420. There it is said:—"By a law of the *Partidas*, where a man claims another who is in the actual possession of liberty as his slave, the necessity of proving him such is thrown on the

claimant—a *fortiori* where the question arises collaterally with a third party; and the former master by his not interfering furnishes a violent presumption that the state and condition of the plaintiff is that which she represents it to be. *Partidas*, 3, Tit. 15, Law 5." It is presumed that the rule of evidence contained in the latter part of this extract would be applied in other States as well as Louisiana; as to the former proposition there is perhaps more doubt, though the reasonableness of the doctrine seems unquestionable. In *Forsyth v. Nash*, 4 Mart. 389, the court, per *Martin, J.*, said:—"Whenever a plaintiff demands by suit that a person whom he brings into court as a defendant, and thereby admits to be in possession of his freedom, should be declared to be his slave, he must strictly make out his case. In this, if in any, *actore non probante absolvitur reus*."

(*j*) *Gobu v. Gobu*, Tayl. (N. C.) 164; S. C. 2 Hayw. 170, *nom. Gober v. Gober*; *Adelle v. Beauregard*, 1 Mart. 183.

(*k*) *Forsyth v. Nash*, 4 Mart. 385.

a court will not extend to a trial of the question of freedom the principle, applied in other cases, that the laws of a foreign state, when not exhibited in evidence, will be taken to be the same as their own. (*l*) This seems to be on the *ground that slavery is in its nature exceptional to common right, and therefore is not to be presumed to extend beyond the influence of the local law, by force of which alone it exists and is maintained.

Rules of evidence, as well as of procedure, have sometimes been suspended in behalf of parties claiming release from servitude. Former *admissions* of such a claimant, as that he belonged to a third person from whom he ran away, will not, it seems, be allowed the weight against him which is given to admissions in general. (*m*) In Maryland, the rule excluding hearsay evidence has been in several cases considerably relaxed; (*n*) but the Supreme Court of the United States have refused to admit any innovation upon the established principles of evidence. (*o*) The *pedigree* of the petitioner may be shown by hearsay or general reputation. (*p*) A judgment in favor of the plaintiff's freedom, in an action between him and a party from whom the defendant does not derive title, or from whom he derives title by a conveyance prior to the judgment, is not admissible in evidence. (*q*) But, on the same principle, a judgment against the plaintiff's mother in an action for freedom is not evidence against the plaintiff. (*r*) Proof of an emancipation by the party at the

(*l*) See *Marie Louise v. Marot*, 8 Louis. R. 475, 479, cited in note (*c*) ante; and also *Marie Louise v. Marot*, 9 Louis. R. 473, 476, where the fact that by the laws of France a slave brought there by his or her owner is *ipso facto* liberated, was proved to the jury by the testimony of witnesses.

(*m*) *Forsyth v. Nash*, 4 Mart. 385.

(*n*) *Shorter v. Boswell*, 2 H. & Johns. 359; *Mahony v. Ashton*, 4 H. & McH. 295.

(*o*) *Mima Queen v. Hepburn*, 7 Cranch, 290, (where *Duwall, J.*, dissented); confirmed in *Davis v. Wood*, 1 Wheat. 6. In the former case, *Marshall, C. J.*, after declaring the general principle that "Hearsay evidence is

incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge;" added, "However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description, which would be inapplicable to general cases in which a right to property may be asserted."

(*p*) *Mima Queen v. Hepburn*, 7 Cranch, 290.

(*q*) *Davis v. Wood*, 1 Wheat. 6; *Kitty v. Fitzhugh*, 4 Rand. 600.

(*r*) *Toogood v. Scott*, 2 H. & McH.

time in possession of the plaintiff is *prima facie* evidence of an emancipation by his owner. (s) A deed of emancipation, regularly executed and recorded according to the laws of the State where executed, is, it seems, presumptive evidence of *freedom, in an action brought either in that State or another. (t)

Some uncertainty exists as to the damages which may be given, when judgment is rendered for the plaintiff in an action for freedom. The Court of Appeals of Kentucky, in a case before them, asserted as an equitable rule, that if the defendant had reasonable ground to believe the plaintiff to be his slave, the damages should be nominal; otherwise, substantial. (u) This was in equity. In a case at law, another court seemed to regard the amount of damages as lying in the discretion of the jury; and they, under the circumstances of that case, having given substantial damages, the court refused to disturb the verdict. (v) A person held in slavery asserted her freedom in an action of trespass, and recovered judgment, with nominal damages; she afterwards brought another action of trespass for the value of her services while held as a slave; the court held that the action could be maintained, and that the defendant was estopped by the judgment in the former action from contesting her right to wages from the commencement of that former action. (w) It seems that such a second action may be brought for the recovery of wages for a time *antecedent* to the commencement of the first action; but in such a case the controversy becomes again one of title, and the defendant is not estopped to say that at such antecedent time he rightfully held the plaintiff as his slave; (x) and it would appear that there no-

26; *Butler v. Craig*, 2 H. & McH. 214.

(s) *Simmins v. Parker*, 4 Mart. N. S. 200.

(t) *Brown v. Compton*, 10 Mart. 425. This was a cause between the master of the slave and a third party, where the fact of slavery incidentally came in question; what the ruling of the court would have been in an action by the slave for his freedom does not certainly appear.

(u) *Thompson v. Wilmot*, 1 Bibb,

422. See also *Phillis v. Gentin*, 9 Louis. R. 208; *Pleasants v. Pleasants*, 2 Call, 350; *Matilda v. Crenshaw*, 4 Yerg. 299.

(v) *Scott v. Williams*, 1 Dev. 376. As to what may be included in the damages, see *Matilda v. Crenshaw*, 4 Yerg. 299.

(w) *Matilda v. Crenshaw*, 4 Yerg. 299.

(x) *Catron, C. J., Matilda v. Crenshaw, ubi sup.*

thing would prevent his denying, if he chose, that he then held the plaintiff as his slave at all. *Costs* have been allowed to the plaintiff recovering judgment in an action for freedom, although no damages were given by the jury; the ordinary *provisions, making costs depend on the recovery of damages, being held not to apply in a case of this nature. (y)

SECTION III.

THE CAPACITY OF SLAVES TO CONTRACT.

Slaves are in law, in some respects, things; in other respects, persons. As property they are not in general real estate; though they are very frequently descendible as such. But it is as persons that we in this place have to consider them. The liability of a carrier transporting them, it has been held, is that of a carrier of passengers, and not of goods. (z) A slave may be an agent; and the fact of agency may be shown in this case by the same evidence as in any other. (a) In their ordinary service, although they constitute one class of *servants*, they do not, it seems, subject their masters to the same degree of responsibility for the consequences of their negligence that the masters of other servants incur. (b)

Slaves are looked upon as persons by the criminal law. Their most effectual protection against injuries, not affecting life or limb, inflicted by a *stranger*, consists in the right which the law confers upon the master (not only as it seems to secure him from loss, but for the protection of the slave,) to recover damages from the wrong-doer. (c) For such injuries, received at the hand of the master himself, some codes provide penalties of several sorts—among which may be

(y) *Clifton v. Phillips*, 1 McCord, 469.

(z) *Boyce v. Anderson*, 2 Pet. 150; *Clark v. McDonald*, 4 McCord, 223.

(a) *Chastain v. Bowman*, 1 Hill, (So. Car.) 270; *Gore v. Buzzard*, 4 Leigh, 231.

(b) *Snee v. Trice*, 2 Bay, 345.

(c) *White v. Chambers*, 2 Bay, 70. In Maryland the master must, it seems, show a loss of service in order to main-

tain trespass. *Cornfute v. Dale*, 1 H. & Johns. 4. Statutes conferring upon strangers a measure of power over slaves are construed strictly. *Blanchard v. Dixon*, 4 Louis. An. R. 57.—In South Carolina the law does not authorize the killing of a runaway, except where the party attempting to seize him is endangered by actual resistance, as by assaulting or striking. *Arthur v. Wells*, 2 South Car. Const. R. 316.—

classed the equitable power which, in one State at least, is conferred on the court having cognizance of the action for *cruel treatment, to decree, in addition to the regular penalty, that the slave shall be sold away from his owner. (*d*) But in Virginia it has been decided that an indictment cannot be sustained, at common law, against a master for the excessive and cruel beating of his slave; (*e*) and it is believed that in that State, and probably in others, no statutory remedy is provided for the case. The absence of such provision seems to be accounted for within those States, partly by the belief that the interest of the owner is identified with the well-being of his servant, and that this interest, with the natural affection arising out of so close a relation as master and slave, are sufficient guaranties of humane treatment; and partly by the apprehension that in attempting to supply a complete remedy against the hardships incidental to slavery, the stability of the institution itself may be impaired. And it may be there considered as some check upon an inhuman master, that he has before him the risk that his severity, by being carried a little further than his purpose, may expose him to the utmost rigor of justice. It has very recently been held, by the General Court of Virginia, that where the wilful and excessive whipping of a slave by his master and owner, though without any intent to kill, results in death, it is murder in the first degree. (*f*)

SECTION IV.

LIABILITY OF THE MASTER FOR THE SLAVE.

For the torts of a slave his owner is commonly answerable

The battery of a slave by a stranger has been held to be also an indictable offence. *State v. Hale*, 2 Hawks, 582.

(*d*) *Markman v. Close*, 2 Louis. R. 581, 586. And see *Hendricks v. Phillips*, 3 Louis. An. R. 618.

(*e*) *Commonwealth v. Turner*, 5 Rand. 678. And a *híver* has the same immunity as the owner. *The State v. Mann*, 2 Dev. 263.

(*f*) *Souther's case*, 7 Grat. 673. The

court in this case said: — "In inflicting punishment for the sake of punishment, the owner of the slave acts at his peril; and if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation. The principles of the common law in relation to homicide apply to this case, without qualification or exception, and according to those principles, the act of the prisoner, in the

civiliter in damages; (g) but when he commits a crime *punishable with death, upon conviction therefor, his value is assessed, and paid out of the treasury of the State to the owner. (h) A slave who runs away from his master steals himself, and, as in the case of other stolen things, no property, general or special, can be acquired by another in him. (i)

The rule that one who employs agents or servants is not liable to any one of them for an injury occasioned by the negligence or misconduct of any other of them, (ii) is held not applicable to slaves. One reason is, that the free man can leave a service or employment which he finds dangerous, but the slave cannot. Another is, that if employers of hired slaves were thus protected against the consequences of their own carelessness or misconduct, the safety of the slave would be endangered. (j)

case under consideration, amounted to murder. Upon this point we are unanimous."

(g) See the statutes of the several States. In Louisiana, the master may discharge himself from such responsibility by abandoning his slave to the person injured; in which case such person shall sell the slave at public auction, and the surplus, if any, of the proceeds, over the damages and costs, shall be given to the master. Civ. Code of Louis. Art. 2300. — As to the master's liability, in the absence of a statute, see *Snee v. Trice*, 2 Bay, 345.

(h) Such at least is the law in Virginia. Va. Code, 1849, ch. 212, § 9.

(i) See, as to the law in Louisiana, *Oates v. Caffin*, 3 Louis. An. R. 339. — In South Carolina, under the statute of 1790, prohibiting the felonious stealing, taking, or carrying away by a slave of any slave, "being the property of another," with intent to carry him out of the province, it is held that there may be a conviction although no force was employed; on the ground that force is not an essential element in the larceny of animate objects possessing the power of locomotion. *The State v. Whyte*, 2 N. & McC. 174.

(ii) See note (zz) Ch. IX, *post*.

(j) In *Scudder v. Woodbridge*, 1 Geo. 195, it was so decided at the court

below; and on error the Supreme Court say: — "The general doctrine, as contended for by counsel for plaintiff in error, may be correct, . . . and we are disposed to recognize and adopt it with the cautions, limitations, and restrictions in those cases. But interest to the owner, and humanity to the slave, forbid its application to any other than free white agents. . . . Slaves dare not intermeddle with those around, embarked in the same enterprize with themselves. . . . Neither can they exercise the salutary discretion, left to free white agents, of quitting the employment when matters are mismanaged, or portend evil. . . . But we think it needless to multiply reasons upon a point so palpable. There is one view alone which would be conclusive with the court. The restriction of this rule is indispensable to the welfare of the slave. In almost every occupation, requiring combined effort, the employer necessarily intrusts it to a variety of agents. Many of those are destitute of principle, and bankrupt in fortune. Once let it be promulgated that the owner of negroes hired to the numerous navigation, railroad, mining, and manufacturing companies which dot the whole country, and are rapidly increasing — I repeat, that for any injury done to this species of property, let it be un-

To what extent a master is liable to pay for necessities furnished to his slave seems not clearly settled. It has been held that he is liable for medical or surgical assistance rendered to his slave in a case of extreme necessity. (*k*)

A slave cannot enter into any binding contract *with his master*; (*l*) nor can he, while yet a slave, appear as a suitor in a court either of law or equity, to enforce any alleged contract against any person. (*m*) He cannot take by descent; (*n*) nor by purchase, unless freedom accompany the gift of property. (*o*) A bequest to a free person, in trust for him, is void. (*p*)

SECTION V.

OF CONTRACTS BETWEEN A SLAVE AND ONE NOT HIS MASTER.

With respect to the validity of a contract between a slave and a person who is *not* his master, there is some uncertainty. There are statutes, in probably all of the slaveholding States, prohibiting contracts with slaves without the consent of their masters. (*q*) Though no statute upon the subject existed, it would seem to be a necessary incident to slavery, that, on the supposition that a slave can contract at all, the consent of the master, express or implied, must be requisite

derstood and settled that the *employer* is not liable, but that the owner must look for compensation to the *co-servant* who occasioned the mischief; and I hesitate not to affirm, that the life of no *hired* slave would be safe. As it is, the guards thrown around this class of our population are sufficiently few and feeble. We are altogether disinclined to lessen their number or weaken their force. We are, therefore, cordially, confidently, and unanimously agreed, and so adjudge, that the judgment below be affirmed, with costs."

(*k*) *Johnston v. Barrett*, 2 Bail. 562. And see *Dunbar v. Williams*, 10 Johns. 249.

(*l*) *Henry v. Nunn's Heirs*, 11 B. Mon. 239; *Bland v. Negro Dowling*, 9 G. & Johns. 19. There are *dicta* in *Williams v. Brown*, 3 B. & P. 69, which it

would seem cannot be regarded as law in this country.

(*m*) *Bland v. Negro Dowling*, 9 G. & Johns. 19.

(*n*) *Cunningham v. Cunningham*, Cam. & Nor. 353; *Bynum v. Bostick*, 4 Des. 266.

(*o*) *Bynum v. Bostick*, 4 Des. 266; *Hinds v. Brazealle*, 2 How. (Miss.) 837; *Cunningham v. Cunningham*, Cam. & Nor. 353; *Hall v. Mullin*, 5 H. & Johns. 190.

(*p*) *Cunningham v. Cunningham*, Cam. & Nor. 353; *Hinds v. Brazealle*, 2 How. 837; *Brandon v. Planters Bank*, 1 Stew. (Ala.) 320; *Bynum v. Bostick*, 4 Des. 266.

(*q*) See, as to the construction of such language in a statute, per *Archer, J.*, *Bland v. Negro Dowling*, 9 G. & Johns. 27; and *Hall v. Mullin*, 5 H. & Johns. 190.

to enable a slave to bind either a third party or himself by a contract. This seems to have been taken for granted in a case decided in the year 1802, in the Court of Common *Pleas in England; where the binding force, after emancipation, of an agreement entered into by a slave, with the consent of his master, was established, so far as the authority of that case goes. (r) The emancipation of the slave was there connected with his contract, and formed the consideration for it. How it is with a contract which does *not* relate to emancipation is evidently a different matter. In a State where slaves were declared by law incapable of making any kind of contract, a suit was brought to recover the amount of a promissory note given by the defendants to a slave of the plaintiff's; the court, in considering the case, held that although the slave could neither bind herself, because she was without will, nor enter into any contract binding on her master, without special authority from him, yet it did not follow that the master could not claim the benefit of an engagement made in favor of his slave by a person capable of contracting; and the action was maintained. (s) But the same question arising nearly at the same time in another State, the decision there was the other way; on the ground that any contract entered into by a slave in his own name is absolutely void. (t)

SECTION V.

OF GIFTS TO A SLAVE.

Another question of much interest is whether a slave can take by gift, or executed contract; and, if he can take, whe-

(r) *Williams v. Brown*, 3 B. & P. 69, Lord Alvanley, C. J., *dissentiente*.

(s) *Livaudais v. Fon*, 8 Mart. 161. The point here decided now forms a provision of the civil code. See Civ. Code of Louis. Art. 1785.

(t) *Gregg v. Thompson*, 2 South Car. Const. R. 330. The court in this case recognize the Roman law respecting the *status* of slaves, and seem to profess to

decide in accordance with it. *Colcock, J.*, delivering the opinion of the court, said:—"I am aware that at one period in the history of Rome the most abject state of slavery existed, and that the slaves of that day were considered as chattels, and that whatever they acquired was their master's except their *peculium*. But when it is said that whatever they acquire became their master's,

ther the property in the chattel given passes instantaneously to his master, or remains in him, subject to his disposal until specific appropriation by the master. A negro, who was supposed to be free, but who was in fact a slave, purchased his daughter, and then executed to her a deed of emancipation; his own master laid claim to the girl, and for him it was urged that the rule of the civil law prevailed, and that the property passed through the purchaser, being a slave, to the purchaser's master: in behalf of the girl, it was contended that as, under the feudal law, a villein purchasing property held it until appropriation by his lord, with power (before the lord's interference,) to convey a perfect title to his own alienee, the case was the same with a slave; and therefore that the deed of manumission, or conveyance of the girl to herself, was good. The question could not be decided; because upon the construction given by the court to a statute of the State, the sale to the slave-father was *void* by force of that statute, so that the property in the girl did not pass out of the original owner; (*u*) the court however were able to declare the girl free on another ground. But in a subsequent case, in Alabama, where a slave who had found lost property delivered it to the defendant, it was held that the master of the slave might maintain trover; on the ground that the possession of a slave is the possession of his master, and that the special property as finder having been vested in the plaintiff by the act of his slave in taking possession of the lost parcel, could not be divested by any after act of the slave. (*v*) It seems to have been held that a party who has dealt with a slave as free is afterwards estopped from setting up his slavery in avoidance of the contract thus entered into; (*w*) but there is room for much doubt as to the nature and extent of this estoppel.

it is meant whatever they absolutely acquired by gratuity, &c., of others; and so I should hold in relation to our slaves. But it does not follow from thence that the master could sue in his own name, to compel the performance of an *executory* contract. On the contrary, it is said 'they could not plead or be impleaded, for they were excluded from

all civil concerns whatever.' Cooper's Justinian, 416, *in notis*."

(*u*) Hall v. Mullin, 5 H. & Johns. 190.

(*v*) Brandon v. Planters Bank, 1 Stew. (Ala.) 320. With respect to the law in Louisiana, see Voisain v. Cloutier, 3 Louis. 170.

(*w*) Grounux v. Abat, 7 Louis. R. 17.

As we have seen, it is a general principle that a slave cannot contract with his master. (x) In Louisiana, but, it is believed, in no other State, the exception is made of a contract for emancipation; such a contract being there enforceable at the instance of the slave. (y) It was once held that no contract by the master with a third person for the slave's benefit could be enforced; (z) but the better opinion seems to be that a contract of that kind, made for consideration, is valid, (a) and specific performance may be enforced in equity by the party with whom it is made. (b) Where a slave was sold for a term of years, with a power to the vendee to emancipate him at the end of the term, or before, and the vendee executed a deed of manumission accordingly, it was held that the defendant who had purchased from the vendor after the sale, though previous to the execution of the power, could not defend against the negro's claim of freedom. (c)

SECTION VI.

THE PECULIUM.

While it is true in a general sense that all that a slave possesses belongs to his master, the law, as well as usage seems to recognize that slaves in this country, as in ancient Rome, may have certain private property which their masters cannot appropriate. Such property is called the slave's

(x) *Ketletas v. Fleet*, 7 Johns. 324, and *Tom's case*, 5 Johns. 365, if understood as cases of grants of freedom perfect and complete at the time of execution, but to take effect in enjoyment *in futuro*, are not inconsistent with this principle.

(y) *Marie v. Avart*, 6 Mart. 732; Civ. Code of Louis. Art. 174, 1783.

(z) *Beall v. Joseph, Hardin*, 51.

(a) "So far as regards the slaves, the power of the master is indeed absolute. The slave cannot resist, or be heard if he complain of the abuse of this power; but in relation to other persons, nothing prevents the master from being compelled or coerced to comply with his engagements as vendee, which he con-

tracted when he acquired his slave." *Martin, J.*, in *Poydras v. Mourain*, 9 Louis. R. 505.

(b) It was so held in *Thompson v. Wilmot*, 1 Bibb, 422. There the plaintiff had in Maryland sold the slave in question to the defendant, who was about removing to Kentucky, on the condition that the purchaser should emancipate him in seven years; and the defendant signed and delivered a memorandum of his agreement to emancipate. After the expiration of the time, specific performance was decreed in Kentucky upon the prayer of the vendor.

(c) *Negro Cato v. Howard*, 2 H. & Johns. 323.

peculium. This term, as somewhat vaguely defined in the civil code of Louisiana, is the sum of money or portion of movable goods of which the master of a slave has thought fit to allow him the enjoyment. (*d*) Notwithstanding the *peculium thus depends originally upon the license, or grant and license, of the master, it would appear (though we speak very doubtfully upon this point,) that a revocation of the license does not divest the *peculium* acquired under it. It has been held in South Carolina that if the master of a negro permit him to hire himself out, upon condition of paying him certain stipulated wages, all he makes and saves beyond such wages shall be at his own disposal. (*e*) By the law of Louisiana, slaves are entitled to the fruits of their Sunday labor; and even their masters, if they employ them on that day, are bound to remunerate them. (*f*) In other Southern States, as we understand, slaves are by custom allowed, besides the Sabbath, certain holidays in the course of the year, and their earnings on these days, whether received from their masters (who have a kind of preëmptive claim to their services,) or from others, go to their own use. Possibly out of this custom may have grown a right which the law would recognize and enforce; but we apprehend that the matter rests, very generally at least, in the mere liberality of the master.

SECTION VII.

OF THE MARRIAGE OF SLAVES.

The disability of the slave to contract seems to extend even to the contract of marriage. It has been distinctly held

(*d*) Civ. Code of Louis. Art. 175.

(*e*) *Guardian of Sally v. Beaty*, 1 Bay, 260. This was a case very remarkable in its circumstances. The negro, a woman, with whom the master had made the agreement, with rare generosity disposed of her surplus earnings in purchasing a negro for whom she felt a friendly attachment, and to whom she thereupon gave her freedom. Her own master claimed the girl on the

ground that the purchase enured for his benefit, and that the subsequent gift of freedom was a nullity. But the court declared the girl free, and enounced the doctrine in the text.

(*f*) *Rice v. Cade*, 10 Louis. R. 294; and in this case it was held that a master not requiring the services of his slaves on Sunday, and not retaining them on his plantation, impliedly permits them to hire themselves to others.

that the marriage usual in Slave States, which is only cohabitation with consent of the master, is not a legal marriage. Chancellor Kent (*g*) quotes from a case in which this is decided, (*h*) words which state this, and so refer it to the want * of the legal formalities, as to suggest the inference that it is this want which makes the marriage void. But, in another part of this case, it is put quite as much on the ground of their inability to contract. There are statutes which speak of their marriage; but not in such a way as to declare such marriage a legal one, carrying all the incidents of marriage. These incidents seem to us so inconsistent with the condition of slavery, that we do not see how any ceremonies, civil or religious, could make such marriage legal. (*i*) There may be usages or statutory provisions regulating this matter which we have not found; but so far as we can learn the law on this subject, we think that a slave cannot be guilty of adultery, when this crime can only be committed by a married person; nor of polygamy; nor be held liable on a wife's contracts, or for necessities supplied to her; nor made incompetent as a witness on the ground of the relation of marriage. How far all this may be modified by the consent of the owner may be doubtful; but we do not see that even such consent could make the marriage altogether a legal marriage, and invest it with all the rights, duties, and relations of marriage, unless it was such consent and under such circumstances as made it operate as a manumission, as in the case of a devise to a slave.

(*g*) 2 Kent's Com. 88.

(*h*) *State v. Samuel*, 2 Dev. & Batt. 177, 181. See *Hall v. Mullin*, 5 Har. & Johns. 193; and *Jackson v. Lurvey*, 5 Cow. 397.

(*i*) In *Girod v. Lewis*, 6 Mart. 559, the question was whether a marriage during slavery produces after manumission the civil effects resulting from the contract of marriage between free persons. *Mathews, J.*, delivering the opinion of the court, said:—"It is clear that slaves have no legal capacity to assent to any contract. With the

consent of their masters they may marry, and their moral power to agree to such a contract or connection as that of marriage cannot be doubted; but whilst in a state of slavery it cannot produce any civil effect, because slaves are deprived of all civil rights. Emancipation gives to the slave his civil rights; and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons."

SECTION VIII.

EMANCIPATION.

Emancipation is the donation to a slave of his value. (*j*) When a slave is emancipated by will his freedom is a specific legacy to him. (*k*) A bequest of property to a slave, by his master, confers freedom by implication. (*l*) It would seem that any person may emancipate, who, if he did not set the slave free, would have a right to hold him forever against all the world; and accordingly that where the party manumitting had possession long enough to bar an action by the rightful owner against himself, the slave may equally rely upon the provisions of the statute of limitations. (*m*) The inequitableness of a contrary doctrine is obvious; for it would deny to the slave, purchasing himself, the privilege which any other purchaser would enjoy. On the other hand, a rightful owner, whose claim is barred by the statute of limitations, has no power to emancipate. (*n*) It has even been made a question whether a man may execute a valid deed of manumission to his slave, while another party is holding the slave adversely, though without a sufficient length of possession to bar an action. (*o*)

The mode of emancipation is variously regulated by statutes. It seems, however, to be everywhere agreed that all that is done towards a complete emancipation is totally without effect, until the final act, whatever it may be, is performed; and consequently, so long as such final act remains unperformed, the owner may revoke his consent to manumit, and no inchoate right is vested in the slave which even a court of equity can recognize. (*p*)

(*j*) *Martin, J.*, *Prudence v. Bermodi*, 1 Louis. R. 241.

(*k*) And therefore partakes of the privilege of specific legacies with respect to questions of abatement and contribution. *Hammond v. Hammond*, 2 Bland, 306, 314. And see *Williams v. Ash*, 1 How. Sup. Ct. 1.

(*l*) *Hall v. Mullin*, 5 H. & Johns.

190; *Le Grand v. Darnall*, 2 Pet. 664. *Contra*, *Campbell v. Campbell*, 8 Eng. (Ark.) 519.

(*m*) The point was left undecided in *Kitty v. Fitzhugh*, 4 Rand. 600, 607.

(*n*) *Givens v. Manns*, 6 Munf. 191.

(*o*) *Ibid*.

(*p*) *Henry v. Nunn's Heirs* 11 B. Mon. 239; *Wicks v. Chew*, 4 H. &

There may be an emancipation to take effect upon a contingency. A testatrix bequeathed certain slaves, adding the condition that if the legatee carried them out of the State, or sold them to any one, her will was, in either event, that they should be free; the legatee sold one of the slaves, who thereupon filed a petition for his freedom, and it was held, on error, by the Supreme Court of the United States, that he *was free; the qualifying clause of the bequest not being a restraint on alienation inconsistent with the legatee's right of property, but a conditional limitation of freedom, which took effect the moment the negro was sold. (*q*) Conditions *subsequent* to emancipation are, however, void, and the slave takes his freedom absolutely. (*qq*)

Slaves cannot be emancipated to the prejudice of creditors — by statute in some States, and, we presume, by common law or the Stat. 13 Eliz., where State enactments do not exist. (*qr*) Under a statutory provision of that kind, it has been held that the intention of a testator, distinctly manifested, to emancipate his negroes, has the effect to charge his real estate with the payment of his debts, without express word; (*r*) that the creditors, in case the personal assets prove insufficient, must proceed against the real estate, by such means, legal or equitable, as may be open to them; (*s*) and that the burden of proof is upon them to show the insufficiency of the whole assets, real and personal. (*t*) It has also been decided, under the same statutes, that the inquiry as to the sufficiency of assets is not confined to the condition of the estate at the time of the testator's death; but if the assets, although then sufficient, afterwards, in the due course of administration, without any default of the administrator, and before his assent to the manumission, become inadequate to the payment of the debts, the slaves shall be subject

Johns. 543. With regard to *Ketletas v. Fleet*, 7 Johns. 324, and a previous case in New York, see *ante*, p. *339, note (*x*.)

(*q*) *Williams v. Ash*, 1 How. 1. See also *Tom's case*, 5 Johns. 365, and *Ketletas v. Fleet*, 7 Johns. 324. *Quære* as to *Cooke v. Cooke*, 3 Litt. 238.

(*qq*) *Forward v. Thamer*, 9 Gratt. 537; *Spencer v. Negro Dennis*, 8 Gill, 314.

(*qr*) *Union Bank v. Benham*, 23, Ala. 143.

(*r*) *Fenwick v. Chapman*, 9 Pet. 461; *Allein v. Sharp*, 7 G. & J. 96.

(*s*) *Fenwick v. Chapman*, 9 Pet. 461; *Allein v. Sharp*, 7 G. & J. 96. The case of *Negro George v. Corse*, 2 H. & Gill, 1, seems to be overruled.

(*t*) *Allein v. Sharp*, 7 G. & Johns. 96.

to the claims of the creditors; and, on the other hand, if the assets, insufficient at the testator's death, subsequently in due course of administration become sufficient, the manumission shall be consummated. (*u*) An executor who has permitted the manumitted slaves to go at large as free, cannot recall the assent he has thus given to the bequest of freedom. (*v*) Yet an executor who has made an admission of the *sufficiency of assets*, whereby a judgment of freedom * has been obtained in an action at law against him, may, it seems, obtain relief in equity. (*w*) And no judgment of freedom recovered by the slaves in an action against the executor, whether the consequence of his admission of assets or not, concludes the *creditors* from showing, in equity, that the assets are in point of fact insufficient. (*x*) It seems that in any case where the assets are found insufficient, a decree of a court of equity must be obtained for the sale of the emancipated negroes, either for life or for a term of years, as the circumstances of the case may require. (*y*) The right of the testator's widow to her life interest, in the nature of dower, in a share of the slaves, may also be an obstacle to the emancipation by the will. Statutory provision is sometimes made for the satisfaction of this claim of hers, like the claims of creditors, out of other property left by the testator.

It appears to be a part of the policy of the slave-holding States to discourage the increase within their territory, respectively, of the free negro population. (*yy*) By the Constitution of Virginia, as recently revised, it is put out of the power of the legislature to permit emancipation unaccompanied by removal. In other States, statutes, more or less restrictive, have been enacted. The policy of States with respect to the increase of the *slave* population has been somewhat fluctuating. A prohibition upon the importation of slaves as *mer-*

(*u*) *Wilson v. Barnet*, 9 G. & Johns. 158; where the court also ruled that the value of the services of the manumitted slaves, while in the possession of the personal representative, is to be estimated in their favor, as a part of the personal estate of the testator.

(*v*) *Fenwick v. Chapman*, 9 Peters, 461.

(*w*) See *Fenwick v. Chapman*, 9 Pet. 461, 481.

(*x*) *Allein v. Sharp*, 7 G. & Johns. 96; *Fenwick v. Chapman*, 9 Peters, 461.

(*y*) *Allein v. Sharp*, 7 G. & Johns. 96.

(*yy*) *Green v. Lane*, 8 Ire. Eq. 70.

chandise is indeed in force almost everywhere; (z) but it seems now to be universally permitted to persons to bring into the State, for their own service, and not for sale, slaves of whom they were (*bonâ fide*) owners in other States. (a)

* The validity of an emancipation depends upon the law of the State where the negroes emancipated are residing at the time—they being so resident by the consent of their owner. (b) And (in subordination to this principle,) the courts of any State will, in general, enforce an emancipation which owes its effect to the laws of any other State. (c)

SECTION IX.

OF SLAVES FOR A LIMITED TIME, OR STATU-LIBERI.

The condition of persons held in slavery, but entitled to become free at some future time, differs in some of its inci-

(z) By the constitution of Mississippi, as construed by the courts of that State, all slaves brought into the State as merchandise or for sale are *ipso facto* free, without any legislative enactment in aid of the constitutional provision. See *Brien v. Williamson*, 7 How. (Miss.) 14; *Groves v. Slaughter*, 15 Pet. 449; 1 Kent, Comm. 439.

(a) The law in Maryland and Virginia was once otherwise; and while the statute of the former State prohibiting the importation was in force, it was held, that if a slave having the license of his owner to go at large, for the purpose of earning money to purchase his freedom, according to an agreement, in the exercise of that licence go into another State, reside there for a time, then return, and his owner resume possession of him, this is a new importation, and under a statute setting free imported slaves, he is entitled to his freedom. *Bland v. Dowling*, 9 G. & Johns. 19.

(b) *Hunter v. Fulcher*, 1 Leigh, 172; *Simmins v. Parker*, 4 Mart. N. S. 200, 205.—But an emancipation in another State, (by the operation of the law of that State,) during a temporary sojourn there, will not, it seems, be regarded; there must be a *residence*. *Lewis v. Fullerton*, 1 Rand. 15, as construed in *Hunter v. Fulcher*, 1 Leigh, 172. And

see *Mary v. Brown*, 5 Louis. An. R. 269; *Mercer v. Gilman*, 11 B. Mon. 210. As to the effect of the mere fact of the slave's residence for a time in a State whose laws do not tolerate slavery, no statute in that State enacting that absolute freedom shall be the consequence of such residence, see *Lunsford v. Coquillon*, 2 Mart. N. S. 401; *Thomas v. Generis*, 16 Louis. R. 433; *Josephine v. Poultney*, 1 Louis. An. R. 329; *Marie Louise v. Marot*, 9 Louis. R. 473; and the great case of the *Slave Grace*, 2 Hagg. Ad. 94, before Lord Stowell, which seems to be opposed to the doctrine of the Louisiana decisions. In 1846, and subsequent to the Louisiana cases above cited, a statute was enacted in that State upon this subject; and for the construction of it see *Eugene v. Preval*, 2 Louis. An. 180; *Conant v. Guesnard*, 5 Louis. An. 696. See also upon this subject, *Strader v. Graham*, 5 B. Monr. 173; *Mercer v. Gilman*, 11 B. Monr. 210; *Vaughan v. Phebe*, 1 Mart. & Yerg. 1; *Blackmore v. Phill*, 7 Yerg. 452; *Jackson v. Bullock*, 12 Conn. 38.

(c) *Hunter v. Fulcher*, 1 Leigh, 172; *Rankin v. Lydia*, 2 A. K. Marsh. 467, 475; *Harry v. Decker*, Walk. 36.—The language of some cases is indeed such as to admit of the inference that a

dents from ordinary slavery. Such persons are denominated in the Roman law, and in the law of Louisiana, *statu-liberi*. (*d*) By the civil code of that State they are capable of taking property by testament or donation, though not by inheritance; and property given or bequeathed to a *statu-liber* must be preserved for him, under the administration of a curator, in order to be delivered to him in kind when his emancipation shall take place. (*e*) If he die before the time * for his emancipation, the gift or legacy reverts to the donor. (*f*) Possibly, provisions upon the subject (though less complete,) are to be found in the statute books of other States.

It seems that, without the aid of a statute, a court of equity will not enjoin the master of a slave, who is entitled to his freedom at a future day, from removing him out of the State;—at least such an injunction will not be granted upon the prayer of the slave himself. (*g*)

What is the condition of the *children* of a *statu-libera*, or female slave entitled to freedom at a future time? No question in this whole subject is of more interest, and it has received the consideration due to its consequence. On the one side it has been contended that the mother in such a case, though enjoying the prospect of freedom, (which, indeed, may never be realized, as she may die before the day,) is still a slave, and can only communicate to her offspring born during the interim her present *status*; and that they therefore are slaves absolutely. And so the decisions have been; (*h*) though there are obviously very strong, if not stronger rea-

judgment of freedom, in the State by whose laws the emancipation is alleged to take effect, might be required by the court of the other State; but it is believed that the doctrine of the text would be followed at this day. See *Mahoney v. Ashton*, 4 H. & McH. 295; but compare *Stewart v. Oakes*, 5 H. & Johns. 107, note, and *Davis v. Jaquin*, 5 H. & Johns. 100.

(*d*) *Catin v. D'Orgenoy*, 8 Mart. 219.

(*e*) Louis. Civ. Code, Art. 193.

(*f*) Louis. Civ. Code, Art. 195.

(*g*) *Negro Harriett v. Ridgeley*, 9 G. & Johns. 174, where an injunction was

refused.—In *Moosa v. Allain*, 4 Mart. N. S. 102, *Martin, J.*, said, in relation to the condition of a *statu-liber*:—"Perhaps the slave may be allowed the aid of the magistrate, in case of an evident attempt to transport him out of the jurisdiction of the State, in order to frustrate his hope of emancipation, under the will and sale, by compelling the purchaser to give security for the forthcoming of the slave in due time, or otherwise."

(*h*) *Maria v. Surbaugh*, 2 Rand. 228,—where a very elaborate opinion was given by *Green, J.*; *Catin v. D'Or-*

sons to the contrary. (*i*) It has been said (*j*) that it is not even in the power of the original owner, at the time he grants the freedom of the mother *in futuro*, to dispose of her unborn children, and to give them their freedom, either at birth or at a time subsequent. However, statutes have been passed in at least three States, providing for the case more equitably. (*k*)

* There is a case, closely allied to that of a grant of freedom *in futuro*, but distinguishable from it, and capable of giving rise to very different consequences. This is a grant of immediate freedom, accompanied with a reservation of service for a time specified, and making such service the condition of the emancipation. It has been held that the child of a negro woman, born during the time of service so reserved, is free from its birth. (*l*) It seems that such a reservation of service is not enforceable by the master against the woman. (*m*)

genoy, 8 Mart. 218; *McCutchen v. Marshall*, 8 Pet. 220; *Ned v. Beal*, 2 Bibb, 298.

(*i*) Compare that part of the opinion of Judge Green, in *Maria v. Surbaugh*, 2 Rand. 229-31, in which he examines the argument for the mother and children, with the view taken of the nature of a bequest of freedom by *Taney, C. J.*, in *Williams v. Ash*, 1 How. 14.

(*j*) See per *Green, J.*, *Maria v. Surbaugh*, 2 Rand: 228, 235. But see the case of *Negro Jack v. Hopewell*, adjudged by the Court of Appeals of Maryland in the year 1784, and reported in 6 H. & Johns. 20, note.

(*k*) The Maryland statute, 1809, ch. 171, enables the owner of the mother to declare, in the deed or will by which he prospectively manumits the mother, what shall be the condition of her children born in the mean while. In the absence of such a declaration by him, it is

enacted that the children shall be slaves. *Chew v. Gary*, 6 H. & Johns. 525, was a decision under this statute.—The language of the Virginia statute is: "The increase of any female so emancipated by deed or will hereafter made, born between the death of the testator or the record of the deed, and the time when her right to the enjoyment of her freedom arrives, shall also be free at that time, unless the deed or will otherwise provides." Rev. Code 1849, ch. 103, § 10. — In Louisiana the provision is as follows:—"The child born of a woman, after she has acquired the right of being free at a future time, follows the condition of its mother, and becomes free at the time fixed for her enfranchisement, even if the mother should die before that time." Civ. Code, Art. 196.

(*l*) *Isaac v. West*, 6 Rand. 652.

(*m*) See per *Green, J.*, *Isaac v. West*, 6 Rand. 656, 657.

CHAPTER XXII.

OF OUTLAWS, PERSONS ATTAINTED, AND PERSONS EXCOMMUNICATED.

THE process of OUTLAWRY was common in England under the Saxon kings. By it a person was placed wholly out of the protection of the law, so that he was incapable of bringing any action for redress of injury; and it also worked a forfeiture of all goods and chattels to the king. Until some time after the conquest it was confined to cases of felony; but then it was extended by statute to all actions for trespasses *vi et armis*. By later statutes it has been extended to other civil actions. An outlaw might be arrested by the writ of *capias utlagatum*, and committed until the outlawry was reversed. But this reversal was granted on any plausible ground, if the party came into court himself or by attorney; the process being used in modern times merely to compel appearance. (*n*) In some of our older States process of outlawry was permitted and regulated by statute; but it never had much practical existence in this country, and is now wholly disused. (*o*)

ATTAINDER, by the common law, was the inseparable consequence of every sentence of death. Attainder for treason worked a forfeiture of all estates to the king, and such "corruption of blood" that he could neither inherit, nor could any one inherit from him; he was utterly deprived of all rights, and wholly incapacitated from acting under the protection of the law, either for himself or for another. In the words of Blackstone, "the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than to see him executed;" and "by an anticipation

(*n*) 3 Bl. Com. 284.(*o*) See 7 Dane's Abr. 313.

of his punishment he is already dead in law." (*p*) During the conflicts in England between different claimants of the throne, and between the sovereign and the people, this tremendous engine of oppression was unsparingly used, and sometimes under circumstances which gave to it the character of extremest cruelty. It may well be believed that such a process would not find favor among us either when we were colonies, or after we had become States; and it has no existence here.

EXCOMMUNICATION expels a person from the Church of England, and as the civil law comes in aid of the ecclesiastical power of that country, it has been of great moment there; and as it worked a disability almost entire, it was an instrument of great power in the hands of the ecclesiastical authorities. But in this sense excommunication can have no existence in this country, as we have no national church, recognized and armed by the civil law. We have, however, churches, which with us are only voluntary associations organized for religious purposes. As such they are recognized and protected by the law. They must have the right to determine as to their own membership, and to provide for this by forms and by-laws, which if they contradict no principles or provisions of law, and interfere with no personal rights, would doubtless be regarded by the courts. (*pp*) But all questions which come up in relation to the rights or contracts of a person severed from such society, by an act of "excommunication," would be governed by the general principles of the law of property, or of the law of contracts.

(*p*) 4 Bl. Com. 380.

(*pp*) Farnsworth v. Storrs, 5 Cush. 412.

BOOK II.

CONSIDERATION AND ASSENT.

BOOK II.

CHAPTER I.

CONSIDERATION.

Sect. I.—*The Necessity of a Consideration.*

A PROMISE for which there is no consideration cannot be enforced at law. This has been a principle of the common law from the earliest times. (q) It is said to have been borrowed from the Roman law. The phrase "*nudum pactum*"—commonly used to indicate a promise without consideration—certainly was taken from that law; but it does not mean with us precisely what the Roman jurists understood by it. By the civil law gratuitous promises could be enforced only where they were made with due formality, and in prescribed language and manner; then such agreement was a "*pactum verbis prescriptis vestitum*" and where such promise was not so made it was called a "*nudum pactum*," (r) that is, *nudum* because not *vestitum*. But an agreement thus formally ratified or "*vestitum*" was enforced without reference to its consideration; whereas a "*nudum pactum*," or promise not formally ratified, was left to the good faith of the promisor, the law refusing to aid in its enforcement, unless the

(q) 17 Ed. 4, 4, pl. 4; 3 Hen. 6, 36, pl. 33; Bro. Abr. *Action sur le Case*, 40. — See on the subject of Consideration articles by "E. L. P." in the March, May, and July numbers of the American Law

Register for 1854, in which the cases on the whole topic are ably collected.

(r) Vin. *Commen. de Inst. lib. 3, tit. 14*, p. 659, ed. 1755; *Ibidem*, lib. 3, de *verborum obligationibus*, tit. 16, p. 677; *Cod. Lib. 7, tit. 52*, 6th ed. Gothofred.

promisee could prove a distinct consideration. The principle of this is, obviously, that if a contract be not founded upon a consideration, it shall not be enforced, unless ratified in such a way as may show that it was deliberate, intentional, and distinctly understood by both parties. The rule was intended to protect parties from mistake, inadvertence, or fraud. A similar rule or practice, grounded on a similar purpose, prevails on the continent of Europe; where contracts which are properly ratified and confirmed, before a public notary or similar magistrate, are valid without inquiry into their consideration; while a private contract can be enforced only on proof of a consideration. And, indeed, it can only be the same principle which makes reasonable an ancient and well-established distinction in the common law, by virtue whereof a contract *under seal* is in general valid without reference to the consideration; not by way of exception to the rule that no promise can be enforced which was not made for a consideration, but because, as it is said, the seal implies a consideration. The only real meaning of this must be, that the act of sealing is,—as it was in fact formerly much more than it is now—a deliberate and solemn act, implying that caution and fulness of assent which the rule of the civil law was intended to secure. (s)

(s) That this is the real distinction between contracts under seal and contracts not under seal, see Plowd. Arg. in *Sharington v. Stratton*, Plow. R. 308. "Words," says he, "pass from man to man lightly and inconsiderately; but where the agreement is by deed there is more time for deliberation; for when a man passes a thing by deed, first there is the determination of the mind to do it; and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation; and lastly he delivers the writing as his deed, which is the consummation of his resolution; so that there is great deliberation used in the making of deeds, for which reason they are received as a *lien final* to the party, and are adjudged to bind the party, without examining upon what cause or consideration they were made. As if I, by deed, promise

to give you £20, here you shall have an action of debt upon this deed, and the consideration for my promise is not examinable; it is sufficient to say it was the will of the party who made the deed." See 2 Smith's Leading Cases, 456. See also *Morley v. Boothby*, 3 Bing. 111; *Fallowes v. Taylor*, 7 T.R. 477; *Shubrick v. Salmond*, 3 Burr. 1639; Fonbl. on Eq. Vol. 1, p. 344, *n. a.*—Some writers on contracts have said that specialties *do not require* a consideration to render them obligatory at law; but this seems to be somewhat inaccurate. The *existence* of a consideration seems to be as essential in the case of deeds as in simple contracts, but that existence is conclusively presumed from the nature of the contract. It seems that in some of the States by usage, and in others by statute, the want or failure of consideration may be a good defence against an action on a sealed

By the civil law, and the modern continental law, the consideration is the *cause* of the contract. This principle is quoted and apparently adopted by Plowden; and it has been recently acknowledged by high judicial authority, and the *cause* distinctly discriminated from the *motive*. (*t*)

Doubts have been expressed whether a contract reduced to writing was not in this respect the same as one under seal. (*u*) But this question is now abundantly settled; and both in this country and in England a consideration must be proved, where the contract is in writing but not under seal, as much as if the contract were oral only. (*v*) The exceptions to this rule in the case of mercantile negotiable paper are considered elsewhere.

It is a general rule, that where this consideration is expressed in a written contract no other can be proved, (*w*)

contract. See *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 Bay, 11; *Swift v. Hawkins*, 1 Dallas, 17; *Solomon v. Kimmel*, 5 Binn. 232; *Case v. Boughton*, 11 Wend. 106; *Leonard v. Bates*, 1 Blackf. 173; *Coyle v. Fowler*, 3 J. J. Marsh. 473; *Peebles v. Stephens*, 1 Bibb, 500; *Walker v. Walker*, 13 Ire. L. 335.

(*t*) *Thomas v. Thomas*, 2 Q. B. R. 851. In this case the defendant contended that the motive with which an agreement had been made was a part of the legal consideration, and that the declaration ought to have set out the same with the other considerations, but *Patterson, J.*, said:—"It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration." See also *Lilly v. Hays*, 5 Ad. & El. 548; *Smith on*

Cont. p. 88, note.—In *Mouton v. Noble*, 1 Louis. An. R. 192, *Eustis, C. J.*, said:—"Civilians use the word *cause*, in relation to obligations, in the same sense as the word *consideration* is used in the jurisprudence of England and the United States."

(*u*) *Rann v. Hughes*, 3 T. R. 350, n. a, 7 Bro. P. C. 550; *Pillans v. Van Mierop*, 3 Burr. 1663.

(*v*) *Cook v. Bradley*, 7 Conn. 57; *Dodge v. Burdell*, 13 Conn. 170; *Bean v. Burbank*, 16 Maine, 458; *Beverleys v. Holmes*, 4 Munf. 95; *Brown v. Adams*, 1 Stew. 51; *Burnet v. Bisco*, 4 Johns. 235; *People v. Shall*, 9 Cow. 778; *Roper v. Stone*, *Cooke*, 499; *Clark v. Small*, 6 Yerg. 418; *Perrine v. Cheeseman*, 6 Halst. 174.—The consideration, however, need not be expressed in the writing. It may be proved *aliunde*. *Tingley v. Cutler*, 7 Conn. 291; *Arms v. Ashley*, 4 Pick. 71; *Cummings v. Dennett*, 26 Maine, 397; *Mouton v. Noble*, 1 Louis. An. R. 192; *Thompson v. Blanchard*, 3 Comst. 335; *Patchin v. Swift*, 21 Verm. 292. The admission of a consideration in the writing is of course *prima facie* evidence of its existence. *Whitney v. Stearns*, 16 Maine, 394.

(*w*) *Schemerhorn v. Vanderheyden*, 1 Johns. 139; *Veacock v. McCall*, *Gilpin*, 329; *Emery v. Chase*, 5 Greenl. 232; *Howes v. Barker*, 3 Johns. 506; *Cutter v. Reynolds*, 8 B. Munroe, 596.

unless there are words which indicate other considerations; (*x*) for this would be an alteration of the contract by evidence *aliunde*. The same rule is said to be applied in equity, unless relief is sought against the instrument on the ground of fraud or mistake; (*y*) but where not expressed it may be proved. (*z*) And where the contract declares that it was made for valuable consideration, this is *primâ facie* evidence of such consideration. (*a*)

SECTION II.

KINDS OF CONSIDERATIONS.

The civil law division of all considerations into four species, very clearly stated by Blackstone, is logically exact and exhaustive; (*b*) but it has never been so far introduced into

(*x*) *Maigley v. Hauer*, 7 Johns. 341.

(*y*) *Clarkson v. Hanway*, 2 P. Wms. 203; *Peacock v. Monk*, 1 Ves. Sen. 127; *Filmer v. Gott*, 7 Bro. P. C. 70. — But the more modern decisions allow the maker of a deed or contract in writing to show other and additional considerations to those expressed in the instrument. *Emmons v. Littlefield*, 13 Maine, 233; *Tyler v. Carlton*, 7 Greenl. 175; *Wallis v. Wallis*, 4 Mass. 135, *Parsons, C. J.*; *Quarles v. Quarles*, Id. 680; *Wilkinson v. Scott*, 17 Mass. 249.

(*z*) *Orms v. Ashley*, 4 Pick. 71; *Tingley v. Cutler*, 7 Conn. 291.

(*a*) *Whitney v. Stearns*, 16 Maine, 394. See *Sloan v. Gibson*, 4 Missouri, 33.

(*b*) "These valuable considerations are divided by the civilians into four species. 1. *Do, ut des*; as when I give money or goods, on a contract, that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*; as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree

to marry together, or to do any other positive acts on both sides. Or it may be to forbear on one side in consideration of something done on the other, as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or it may be for mutual forbearance on both sides; as, that in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des*; when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages, or an agreed sum of money, here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *Do, ut facias*; which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work; which is nothing else but the last species inverted; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*." 2 Bl. Com. 444.

the common law as to be of much practical utility in determining questions of law.

The fundamental distinction in the common law is between those cases where the consideration is a benefit to him who makes the promise, and those in which it is some injury to him who receives the promise. For it is a perfectly well-settled rule, that if a benefit accrues to him who makes the promise, or if any loss or disadvantage accrues to him to whom it is made, although without benefit to the promisor, in either case the consideration is sufficient to sustain *assumpsit*. (c)

Considerations, at common law, may be *good*, or *valuable*. The definition of Blackstone is this:—"A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is therefore founded in motives of justice." (d) A valuable consideration is usually in some way pecuniary, or convertible into money; marriage, which it is now settled is a valuable consideration, (e) is the principal exception to this.

An equitable consideration is sufficient as between the parties, although it be not valuable; but only a valuable consideration is valid as against a third party, as a subsequent purchaser, (f) whose debt existed when the contract was made, an attaching creditor, or the like. It is at least

(c) Com. Dig. Action upon the Case upon Assumpsit (B. 1); Pillans v. Van Mierop, 3 Burr. 1673; Nerot v. Wallace, 3 T. R. 24; Bunn v. Guy, 4 East, 194; Willatts v. Kennedy, 8 Bing. 5; Miller v. Drake, 1 Caines, 45; Powell v. Brown, 3 Johns. 100; Forster v. Fuller, 6 Mass. 58; Townsley v. Sumrall, 2 Pet. 182.

(d) 2 Bl. Com. 297. In Coyle v. Fowler, 3 J. J. Marsh. 473, it is said:—"A plea that a note was executed without any 'good' consideration would not be a bar to a suit on the note, because it is immaterial whether there was a 'good' consideration or not, provided there was a 'valuable' consideration; and there

not only might be a 'valuable' consideration in the absence of a 'good' consideration, but the two considerations are seldom united. When there is a 'good' consideration there is not generally, also, a 'valuable' consideration, and *e converso*. There may be a valuable consideration, which is not valid in law."

(e) Whelan v. Whelan, 3 Cow. 537; Sterry v. Arden, 1 Johns. Ch. 261; Barr v. Hill, Add. 276; Hustin v. Cantril, 11 Leigh, 136; Magniac v. Thompson, 7 Pet. 348.

(f) Lord Tenterden, C. J., in Gully v. Bishop of Exeter, 10 B. & C. 606; Chitty on Cont. 28.

true that an equitable consideration is sufficient in all conveyances by deed, and in transfers not by deed, but accompanied by immediate possession. (g) But where there is a promise, performable of course in future, and the consideration is only moral, there it might have been said formerly that the law was not positively settled. But the late cases settle the question definitively. Mr. Baron Parke has said, "a mere moral consideration is *nothing*." (h) Neither the rule

(g) *Noble v. Smith*, 2 Johns. 52; *Grangaic v. Arden*, 10 Johns. 293; *Pitts v. Mangum*, 2 Bailey, 588; *Pearson v. Pearson*, 7 Johns. 26; *Frisbie v. McCarty*, 1 Stew. & Port. 56; *Fowler v. Stuart*, 1 McCord, 504; *Ewing v. Ewing*, 2 Leigh, 337; *Carpenter v. Dodge*, 20 Verm. 595. In *Smith v. Smith*, 7 C. & P. 401, it was *held* that a gift from a father to a son of a watch, chain, and seals, was valid upon delivery, and the father could not afterwards revoke the gift.

(h) *Jennings v. Brown*, 9 M. & W. 501. This subject was examined at length in the late case of *Eastwood v. Kenyon*, 11 Ad. & Ell. 438, where it was *held* that a pecuniary benefit, voluntarily conferred by plaintiff and accepted by defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by defendant to reimburse plaintiff. Therefore, where the declaration in assumpsit stated that plaintiff was executor of the father of defendant's wife, who died intestate as to his land, leaving defendant's wife, an infant, his only child and heir; that plaintiff acted as her guardian and agent during infancy, and in that capacity expended money on her maintenance and education, in the management and improvement of the land, and in paying the interest of a mortgage on it; that the estate was benefited thereby to the full amount of such expenditure; that plaintiff, being unable to repay himself out of the personal assets, borrowed money of A. B. on his promissory note; that the defendant's wife, when of age and before marriage, assented to the loan and the note, and requested plaintiff to give up the management of the property to her, and promised to pay the note, and did in fact pay one year's interest on it; that plaintiff thereupon gave up the ma-

agement accordingly; that defendant, after his marriage, assented to the plaintiff's accounts, and upon such accounting a certain sum was found due to plaintiff for moneys so spent and borrowed; that the defendant, in right of his wife, received all the benefit of plaintiff's said services and expenditure, and thereupon in consideration of the premises, promised plaintiff to pay and discharge the note. *Held*, on motion in arrest of judgment, that the declaration was bad as not disclosing a sufficient consideration for defendant's promise. And Lord *Denman* said in giving judgment:—"Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney*, 3 B. & P. 249, and the conclusion there arrived at seems to be correct in general, 'that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision.' Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Loyd v. Lee*, 1 Stra. 94; debts of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases have occurred upon this subject which require to be more particularly examined. *Barnes v. Hedley*, 2 Taunt. 184, decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had

which so distinctly postpones moral considerations to those which are pecuniary, nor that which seems to embrace mar-

been by agreement struck out, was binding. *Lee v. Muggeridge*, 5 Taunt. 36, upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of *Mansfield*, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this court in *Cooper v. Martin*, 4 East, 76, where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note above referred to, which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley*, is fully consistent with the doctrine in that note laid down. *Cooper v. Martin* also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the court much more in respect of the supposed statutable liability of a stepfather, which was denied by the court, and in respect of what a court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed, that Lord *Ellenborough* in giving his judgment says:—‘The plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury;’ and undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge* must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should, however, be observed, that in that case

there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee*, 2 B. & Ad. 811, tried by *Gaselee*, J., at N. P., when the learned judge held, notwithstanding, that ‘the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon.’ After time taken for deliberation this court refused even a rule to show cause why the nonsuit should not be set aside. *Lee v. Muggeridge* was cited on the motion, and was sought to be distinguished by Lord *Tenterden*, because there the circumstances raising the consideration were set out truly on the record, but in *Littlefield v. Shee* the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord *Tenterden* added, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge*, where the doctrine is wholly unqualified. The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* spoke of Lord *Mansfield* as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney* shows the deduction to be erroneous. If the former, Lord *Tenterden* and this court declared that they could not adopt it in *Littlefield v. Shee*. Indeed, the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a pro-

riage within the same category as money, appear at first sight very creditable to the common law. There is, however, one reason which doubtless had much influence in establishing this rule; and that is the extreme difficulty of deciding between considerations bearing a moral aspect, which were and which were not sufficient to sustain an action at law. And the rule may now be stated as follows: a moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of law. Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations, or bankruptcy, is good, without other consideration than the previous legal obligation. But the morality of the promise, however certain, or however urgent the duty, does not of itself suffice for a consideration. In fact, the rule amounts at present to little more than permission to a party to waive certain posi-

mise creates a moral obligation to perform it." The same doctrine was supported by the later case of *Kaye v. Dutton*, 7 Mann. & Gr. 807. — The case of *Lee v. Muggeridge* is clearly wrong, and inconsistent with many subsequent cases in England and this country, where the doctrine is now almost universally recognized, whatever it may have been in some earlier cases, that a mere moral obligation is not sufficient to support an express promise. Thus, where a son, who was of full age, and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff; and afterwards the father wrote to the plaintiff, promising to pay the expenses incurred, it was held that such a promise would not sustain an action. *Mills v. Wyman*, 3 Pick. 207. So, where the plaintiff had furnished necessities to a person, indigent and in need of relief, and his son, who was of sufficient ability, signed and delivered this writing to the plaintiff, viz: — "This may certify that the debt now due from my father to A. [the plaintiff,] I acknowledge

to be for necessities of life, and of such a nature that I consider myself hereby obligated to pay A. \$60 towards said debt, now due, provided my father does not settle with A. in his lifetime;" it was held that this contract was void, for want of consideration. *Cook v. Bradley*, 7 Conn. 57. See also *Loomis v. Newhall*, 15 Pick. 159, similar to *Mills v. Wyman*; *Hawley v. Farrar*, 1 Verm. 420; *Parker v. Carter*, 4 Munf. 273, where a promise by a son to pay a debt for his father was held void for want of consideration; *McPherson v. Rees*, 2 Penn. 521; *Smith v. Ware*, 13 Johns. 257, where a lot of land was sold, described in the deed as *supposed* to contain ninety-three acres, but was found to be five or six acres short, the promise of the seller to pay for the deficiency was held to be without consideration. *Frear v. Hardenbergh*, 5 Johns. 272, where a promise to pay for labor of plaintiff on land recovered from him by defendant in a suit at law, was held void for want of consideration. This case was cited with approbation in *Society, &c. v. Wheeler*, 2 Gallison, 143.

tive rules of law which would protect him from a plaintiff claiming a just debt. (i)

* Perhaps an illustration of the rule, that a moral obligation does not form a valid consideration for a promise, unless the moral duty were once a legal one, may be found in the case of a widow, who promises to pay for money expended at her request or lent to her during her marriage. It has been held in England, in a case examined in a former note, (j) that this promise was binding, and there are many *dicta* to that effect in this country; (k) but the current of recent decision in England is rather in favor of the view that the promise of a married woman has not, when given, any legal force, and therefore is not voidable, but void; and cannot be ratified by a subsequent promise after the coverture has ceased, nor be regarded as a sufficient consideration for a new promise. (l) And a late case in New York takes the same ground very decidedly. (m) It has, however, been held that the promise of a widow to pay for goods furnished during her coverture, *on the faith of her separate estate*, was binding. (n)

(i) *Way v. Sperry*, 6 Cush. 238; *Turner v. Chrisman*, 20 Ohio, 332; *Dodge v. Adams*, 19 Pick. 429; *Ehle v. Judson*, 24 Wend. 97; *Warren v. Whitney*, 24 Maine, 561; *Geer v. Archer*, 2 Barb. 420. In this last case it was held that an express promise can only revive a precedent good consideration, which might have been enforced through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. But it is not necessary that the moral obligation in order to be a good foundation for an express promise, should be such that, without the express promise, an action could once have been

sustained upon it. But, if it could have been made available in a defence, it is equally within the rule. See also *Nash v. Russell*, 5 Barb. 556; *Mardis v. Tyler*, 10 B. Mon. 382; *Watkins v. Halstead*, 2 Sandf. 311, and page 308, *ante*.

(j) *Lee v. Muggeridge*, 5 Taunt. 47; see note (h) *ante*.

(k) *Cook v. Bradley*, 7 Conn. 57; *Hatchell v. Odom*, 2 Dev. & Bat. 302; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420.

(l) *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8 Ad. & El. 467; *Eastwood v. Kenyon*, 11 Ad. & El. 438. See also *Loyd v. Lee*, 1 Str. 94, and note (h) *ante*.

(m) *Watkins v. Halstead*, 2 Sandf. 311.

(n) *Vance v. Wells*, 8 Ala. 399.

SECTION III.

ADEQUACY OF CONSIDERATION.

If the consideration be valuable it need not be *adequate*; that is, the court will not inquire into the exact proportion between the value of the consideration and that of the thing to be done for it. (*o*) But it must have some real value; and * if this be very small, this circumstance may, even by itself and still more when connected with other indications, imply or sustain a charge of fraud. (*p*) The courts, both in law and in equity, refuse to disturb contracts on questions of mere adequacy, whether the consideration be of benefit to the promisor, or of injury to the promisee. Nevertheless, if an agreement be unreasonable or unconscionable, but not in such a way or to such a degree as to imply fraud, courts of equity will not decree a specific performance, (*pp*) and though courts

(*o*) *Skeate v. Beale*, 11 Ad. & El. 983; *Hitchcock v. Coker*, 6 Ad. & El. 438, 456; *Hubbard v. Coolidge*, 1 Met. 84; *Whittle v. Skinner*, 23 Verm. 532; *Sanborn v. French*, 2 Fost. 246; *Phillips v. Bateman*, 16 East, 372; *Kirwan v. Kirwan*, 2 C. & M. 623; *Cole v. Trecothick*, 9 Ves. 246; *Floyer v. Sheppard*, Amb. 18; *MacGhee v. Morgan*, 2 Sch. & Lef. 395, n. a; *Low v. Barchard*, 8 Ves. 133; *Speed v. Phillips*, 3 Anst. 732.

(*p*) *Cockell v. Taylor*, 15 E. L. & E. 101; *Edwards v. Burt*, 15 E. L. & E. 435; *Johnson v. Dorsey*, 7 Gill, 269; *Wormack v. Rogers*, 9 Georg. 60; *Judge v. Wilkins*, 19 Ala. 765; *Milnes v. Cowley*, 8 Price, 620; *Prebble v. Boghurt*, 1 Swanst. 329. Mere folly or weakness or want of judgment, will not defeat a contract. This is well illustrated by the case of *James v. Morgan*, 1 Lev. 111, 1 Keb. 569. An action was brought in special assumpsit, on an agreement to pay for a horse a barley corn a nail, for every nail in the horse's shoes, and double every nail, which came, there being thirty-two nails, to five hundred quarters of barley; and on a trial before *Hyde, J.*, the jury under his direction gave the full value of the horse, £8, as

damages; and it is to be collected that the contract was considered valid; for the report states that there was afterwards a motion to the court in arrest of judgment, for a small fault in the declaration, which was overruled, and the plaintiff had judgment. See *Chitty on Cont.* 32. And where in an action of assumpsit it was alleged that in consideration of 2s. 6d. paid, and 4l. 17s. 6d. to be paid, the defendant promised to deliver two rye corns on the then next Monday, and double in geometrical progression every succeeding Monday, (or every other Monday,) for a year, which would have required the delivery of more rye than was grown in the whole year, the court on demurrer seemed to consider the contract good; and *Powell, J.*, said, that although the contract was a foolish one, yet it would hold good in law, and that the defendant ought to pay something for his folly; but no judgment was given, the case being compromised. *Thornborow v. Whiteacre*, 2 Ld. Raym. 1164. See *Chitty on Cont.* 32.

(*pp*) *Osgood v. Franklin*, 2 Johns. Ch. R. 23; *Mortlock v. Buller*, 10 Ves. 292; *Gasque v. Small*, 2 Strob. Eq. 72.

of law will not declare the contract void, they will give only reasonable damages to the plaintiff who seeks compensation for a breach of it. (*q*) When adequacy of consideration becomes material, it is a question for the court. (*r*)

As the consideration must have some value and reality, * the assumption of a supposed danger or liability, which has no foundation in law or in fact, is not a valuable or sufficient consideration, (*s*) nor is the performance of that which the party was under a previous valid legal obligation to do; (*ss*) and where one through mistake of the law acknowledges himself under an obligation which the law does not impose, he is not bound by such promise; (*t*) although, in general, ignorance of the law is no excuse or defence, for if it were, "a premium would be held out to ignorance." (*tt*)

SECTION IV.

PREVENTION OF LITIGATION.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. (*u*)

(*q*) Thus, where an execution creditor proposed to discharge the execution, without putting it into an officer's hands, if the debtor would give his note for the debt and costs, and also the sum which an officer might charge for collecting the execution, and such note was given, payable in oats, at a very low price per bushel; the court held that though the note was not usurious, yet it was unconscionable, and they deducted the sum included in the note as officer's fees from the amount of the verdict on the note. *Cutler v. How*, 8 Mass. 257. See *Cutler v. Johnson*, 8 Mass. 266. — So, where the defendant hired a cow and calf of the plaintiff, and agreed to return them in one year, with six dollars for the use of them, and, if not then delivered, six dollars annually until delivered, it was held that the plaintiff was entitled to recover the value of the cattle, with six dollars for the use of them for one year only, and interest on those sums from the expiration of the year

until the cattle were delivered. *Baxter v. Wales*, 12 Mass. 365.

(*r*) *Best, C. J.*, in *Homer v. Ashford*, 3 Bing. 327.

(*s*) *Cabot v. Haskins*, 3 Pick. 83.

(*ss*) *Harris v. Watson, Peake, N. P. C.* 72; *Stilk v. Myrick*, 2 Camp. 317; *Callagan v. Hallett*, 1 Caines, 104; *Willis v. Peckham*, 1 Bro. & B. 515; *Collins v. Godefroy*, 1 B. & Ad. 950; *Sweany v. Hunter*, 1 Murphy, 181; *Smith v. Bartholemew*, 1 Met. 276; *Crowhurst v. Laverack*, 16 E. L. & E. 498; *L'Amoureux v. Gould*, 3 Selden, 349.

(*t*) *Warder v. Tucker*, 7 Mass. 449; *Frecman v. Boynton*, 7 Mass. 483; *May v. Coffin*, 4 Mass. 347; *Silvernail v. Cole*, 12 Barb. 685; *Ross's Exr. v. M'Lauchlan's Admr.* 7 Grattan, 86.

(*tt*) *Bilbie v. Lumley*, 2 East, 469.

(*u*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 444. In this case a bill was filed in chancery to enforce specific performance of articles of agreement under seal, entered into for the purpose of ascer-

Thus, a mutual submission of demands and claims to arbitration is binding so far as this, that the mutual promises are a consideration each for the other. (v) But the submission must be mutually binding; that is, equally obligatory on both parties, or the consideration fails. On the same ground a mutual compromise is sustained. (w) With the courts of this country the prevention of litigation is not only a sufficient, but a highly favored consideration; (x) and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them. (y)

So giving up a suit, or any equivalent proceedings instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof. (z) And in these cases ine-

taining and settling the boundaries of two provinces of America, and providing for mutual conveyances, &c. It was objected amongst other things, that the agreement was merely voluntary, and that equity never decrees specifically without a consideration. Upon which the Chancellor (Lord Hardwicke) observed, that it was true that the court never decrees specifically without a consideration; but that the agreement in question was not without consideration; for though nothing valuable was given on the face of the articles as a consideration, the settling boundaries, and peace and quiet, formed a mutual consideration on each side; and in all cases make a consideration to support a suit in chancery, for performance of the agreement for settling the boundaries." See also *Wiseman v. Roper*, 1 Chan. Rep. 158; *Stapilton v. Stapilton*, 1 Atk. 3.

(v) *Hodges v. Saunders*, 17 Pick. 470; *Jones v. Boston Mill Corp.* 4 Pick. 507; Com. Dig. Action upon the Case on Assumpsit, (A. 1.) (B. 2)

(w) *Durham v. Wadlington*, 2 Strob. Eq. 258; *Van Dyke v. Davis*, 2 Mich. 145; *Hoge v. Hoge*, 1 Watts, 216. In this case, *Gibson, C. J.*, held that a compromise of a doubtful title was binding upon the parties, although ignorant of

their rights, unless vitiated by fraud sufficient to avoid any other contract. In *Cavode v. McKelvey*, Addison, 56, where conflicting titles to land were settled by one claimant purchasing the title of the other, it was held that the settlement was a good consideration to support such purchase, although the title was bad. In *O'Keson v. Barclay*, 2 Penn. 531, an action for slander was compromised by the defendant agreeing to give the plaintiff a certain sum. Held, by the Supreme Court, reversing the judgment of the court below, that there was a sufficient consideration for the promise, although the words laid in the declaration were not actionable.

(x) See in addition to cases in last note, *Zane v. Zane*, 6 Munf. 406; *Taylor v. Patrick*, 1 Bibb, 168; *Fisher v. May*, 2 Bibb, 448; *Truett v. Chaplin*, 4 Hawks, 178; *Brown v. Sloan*, 6 Watts, 421; *Stoddard v. Mix*, 14 Conn. 12; *Rice v. Bixler*, 1 Watts & Serg. 456; *Barlow v. Ocean Ins. Co.* 4 Met. 270.

(y) *Ex parte Lucy*, 21 E. L. & E. 199; *Mills v. Lee*, 6 Monr. 91; *Moore v. Fitzwater*, 2 Rand. 442; *Bennet v. Paine*, 5 Watts, 259.

(z) In *Longridge v. Dorville*, 5 B. & Ald. 117, it was held that the giving up a suit, instituted to try a question respecting which the law is doubtful, is a

quality of consideration does not constitute a valid objection ; it is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful.

* But a promise to pay money, in consideration that the promisee would abandon proceedings in which the public are interested, is not sustainable, because such consideration is void on grounds of public policy. (*a*)

good consideration for a promise to pay a stipulated sum ; and therefore where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings the agent of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages ; it was *held* that there being contradictory decisions as to the point whether ship-owners were liable for an injury done, while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. — But in *Watters v. Smith*, 2 B. & Ad. 889, where this case was relied upon, the case was that B. & C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce the plaintiff's demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of the suit. This was agreed to, and a receipt given for the sum paid, which was stated to be for debt and costs in *that action*. A. having afterwards sued C., it was *held* that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and therefore it was no defence for C. — In *Wilkinson v. Byers*, 1 Ad. & El. 106, the Court of King's Bench *held* that where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand is a good

consideration for a promise by the plaintiff to stay proceedings and pay his own costs. And, per *Littledale, J.*, even in the case of a liquidated demand, the same promise made in consideration of the payment of such demand, may be enforced in an action of assumpsit, when the agreement has been such that the court would stay proceedings if the plaintiff attempted to go on. See *Wilbur v. Crane*, 13 Pick. 284 ; *Mills v. Lee*, 6 Monr. 97 ; *Union Bank v. Geary*, 5 Pet. 114 ; *Bennet v. Paine*, 5 Watts, 259 ; *Hey v. Moorhouse*, 6 Bing. N. C. 52 ; *Stracy v. Bank of England*, 6 Bing. 754 ; *Atlee v. Backhouse*, 3 M. & W. 648 ; *Richardson v. Mellish*, 2 Bing. 229 ; *Thornton v. Fairlie*, 2 Moore, 397, 408, 409.

(*a*) In *Coppock v. Bower*, 4 M. & W. 361, a petition having been presented to the House of Commons against the return of a member, on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition. Lord *Abinger* said : — “ Then the next question is whether this is an unlawful agreement ; and I think that though it may not be so by any statute, yet it is unlawful by the common law. Here was a petition presented on a charge of bribery. Now this is a proceeding instituted not for the benefit of the individuals, but of the public ; and the only interest in it which the law recognizes is that of the public. I agree that if the person who prefers that petition finds, in the progress of the inquiry, that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investigation. It seems to me as unlawful to do so, as it would be to take money to stop a prosecution for a crime. In either case the

SECTION V.

FORBEARANCE.

An agreement to forbear for a time, proceedings at law or in equity, to enforce a well founded claim, is a valid consideration for a promise. (b) But this consideration fails if * it be shown that the claim is wholly and certainly unsustainable at law or in equity; (c) but mere proof that it is

prosecutor might say that he is not bound, at his own expense, to continue an inquiry in which the public alone are interested; but such a reason does not amount to an excuse, where he receives money for discontinuing the proceedings."

(b) See 1 Rol. Abr. 24, pl. 33; Com. Dig. Action upon the Case upon Assumpsit, (B. 1); 3 Chitty, Com. L. 66, 67. — In *Atkinson v. Bayntun*, 1 Bing. N. C. 444, one M. being in custody pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, the defendant, in consideration that the plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution; it was held that the defendant's contract was valid. — As to the mode of declaring in such case, see *Willatts v. Kennedy*, 8 Bing. 5; *Moston v. Burn*, 7 Ad. & El. 19. In this country the same general principles are recognized. Thus, if one promise to pay the debt of another, in consideration that the creditor will "forbear and give further time for the payment" of the debt; this is a sufficient consideration, though no particular time of forbearance be stipulated; the creditor averring that he did thereupon forbear, from such a day till such a day. *King v. Upton*, 4 Greenl. 387. See also *Elting v. Vanderlyn*, 4 Johns. 237. — So an agreement by a surety to forbear a suit against his principal, *after he shall have paid the debt of the principal*, is a good consideration to support a promise, although at the time of the agreement the surety had no cause of action against the principal. *Hamaker v. Eberley*, 2 Binn. 506. — So a promise to forbear, for six months, to sue

a third person, on a just cause of action, is a valid and sufficient consideration for a promissory note. And in a suit on such note by the payee against the maker, the burden of proof is not on the payee, to show that he has forborne according to his promise, but on the maker, to show that he has not. *Jenkinson v. Stafford*, 1 Cush. 168. See also *Giles v. Ackles*, 9 Barr, 147; *Silvis v. Ely*, 3 W. & S. 420; *Watson v. Randall*, 20 Wend. 201; *Ford v. Rehman*, Wright, 434; *Gilman v. Kibler*, 5 Humph. 19; *Colgin v. Henley*, 6 Leigh, 85; *Rood v. Jones*, 1 Doug. (Mich.) 188; *Martin v. Black's Exrs.* 20 Ala. 309; *McKinley v. Watkins*, 13 Ill. 140.

(c) *Gould v. Armstrong*, 2 Hall, 266; *Lowe v. Weatherley*, 4 Dev. & Bat. 212; *Jones v. Ashburnham*, 4 East, 455; *Smith v. Algar*, 1 B. & Ad. 604; *Martin v. Black's Exrs.* 20 Ala. 309; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119. The case of *Wade v. Simeon*, 2 C. B. 548, well illustrates this principle. In that case the declaration stated that the plaintiff had brought an action against the defendant in the Exchequer to recover certain moneys; that the defendant pleaded various pleas, on which issues in fact had been joined, which were about to be tried; and that, in consideration that the plaintiff would forbear proceeding in that action until a certain day, the plaintiff promised on that day to pay the amount, but that he made default, &c. Plea, that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until and at the time of the

doubtful will not invalidate the consideration. (d) Nor is it necessary that the forbearance should extend to an entire discharge; any delay, which is real and not merely colorable, is enough. (e) Nor is it material whether the proceedings to be forborne have been commenced or not. (f) Nor need the agreement to a delay be for a time certain; for it may be for a reasonable time, and yet be sufficient consideration for a promise. (g) But in declaring on a promise made on such a consideration, the plaintiff must allege and

making of the promise well knew. To this plea there was a general demurrer. *Tindal, C. J.*, said:—"By demurring to the plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action; and beneficial to the defendant it cannot be; for in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff it has been urged that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear *commencing* proceedings. I must, however, confess that, if that were so, I do not see that it would make any substantial difference. The older cases, and some of the modern ones too, do not afford any countenance to that distinction. In *Tooley v. Windham, Cro. Eliz.* 206, (more fully reported 2 *Leonard*, 105,) it is stated that the plaintiff had purchased a writ out of Chancery against the defendant, to the intent to exhibit a bill against him; upon the return of the

writ, which was for the profits of certain lands, which the father of the defendant had taken in his lifetime, the defendant, in consideration he would surcease his suit, promised to him that if he could prove that his father had taken the profits, or had possession of the land under the title of the father of the plaintiff, he would pay him for the profits of the land; and the court held that the promise was without consideration and void. There the suit was in existence at the time of the making of the promise. So, in *Atkinson v. Settree, Willes*, 482, an action had been commenced at the time the promise was made. These cases seem to me to establish the principle upon which our present judgment rests, and I am not aware that it is at all opposed by *Longridge v. Dorville*." See also *Barber v. Fox*, 1 Vent. 159, 2 Wms. Saund. 134; *Randall v. Harvey, Palm.* 394; *Atkinson v. Settree, Willes*, 482; *King v. Hobbs, Yelv.* 26; *Hammond v. Roll, March*, 202; *Lloyd v. Lee*, 1 Stra. 94; *Goodwin v. Willoughby, Latch*, 141, Poph. 177; *Silvernail v. Cole*, 12 Barb. 685.

(d) *Longridge v. Dorville*, 5 B. & Ald. 117; *Zane v. Zane*, 6 Munf. 406; *Blake v. Peck*, 11 Verm. 483; *Truett v. Chaplin*, 4 Hawks, 178.

(e) *Sage v. Wilcox*, 6 Conn. 81. Here the delay was *one year*. *Baker v. Jacob*, 1 Bulst. 41. Here the delay was a *fortnight*, or thereabouts. See also *ante*, n. (b).

(f) *Wade v. Simeon, ante*, n. (c); *Ha-maker v. Eberley*, 2 Binn. 506.

(g) *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; *Sidwell v. Evans*, 1 Penn. 385; *Downing v. Funk*, 5 Rawle, 69; *Hakes v. Hotchkiss*, 23 Verm. 235. See also *ante*, n. (b).

prove the actual time of forbearance, and if this be judged by the Court to be reasonable, the action will be sustained; (*h*) but where the stay of action is wholly uncertain, or such as can be of no benefit to the debtor or detriment to the creditor, it is not enough. (*i*) And it is not enough to allege in the declaration that disputes and controversies existed concerning a certain debt, and that the promise on which the action is brought was made in consideration that the plaintiff promised not to sue for that debt; for this is no allegation that a debt actually existed, and there must be such an allegation; but with it there may be an allegation of disputes and controversies concerning its amount. (*j*) It seems to be settled *that a general agreement to forbear all suits is to be construed as a perpetual forbearance; (*k*) and a promise resting on the consideration of such forbearance is no longer binding, when the suit, which was to be forborne, is commenced.

It is not material that the party who makes the promise, in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay. (*l*) It is enough that he requests such forbear-

(*h*) *King v. Upton*, 4 Greenl. 387; *Barnhurst v. Cabbot*, Hardr. 5.

(*i*) *Jones v. Ashburnham*, 4 East, 455; *Nelson v. Serle*, 4 M. & W. 795; *Bixler v. Ream*, 3 Penn. 282. See also *Rix v. Adams*, 9 Verm. 233.

(*j*) *Edwards v. Baugh*, 11 M. & W. 641. Lord Abinger, C.B. "The declaration only alleges that certain *disputes and controversies* were pending between the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word 'controversy' to render this a good allegation of consideration. The controversy merely is, that the plaintiff claims the debt, and the other denies it. The case might have been different, if the declaration had said, 'Whereas the defendant was indebted to the plaintiff in divers sums of money, for money lent, and also on an account stated,' that a dispute arose as to the amount of the debt so due; and in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving £100, should not sue

the defendant in respect to his original claim. In that case the plaintiff would have been bound to prove at the trial the existence of a debt to some amount; he might not, indeed, be bound to prove the full amount, but simply to show such a claim as to lay a reasonable ground for the defendant's making the promise: whereas, in the present case, he would not have to prove any thing beyond the fact that there had been a dispute between himself and the defendant as to the existence of a debt. A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is depending, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs which he would have to pay, even if he were successful."

(*k*) *Clark v. Russel*, 3 Watts, 213; *Sidwell v. Evans*, 1 Penn. 385.

(*l*) *Smith v. Algar*, 1 B. & Ad. 603. See *Emmott v. Kearns*, 5 Bing. N. C. 559. In *Maud v. Waterhouse*, 2 C. &

ance; for the benefit to the defendant will be supposed to extend to him, and it would also be enough to make the consideration valid, that the creditor is injured by the delay. But there must have been some party who could have been sued. (*m*) And in cases in which the person to be forborne is not mentioned, but the forbearance may be understood to be forbearance of whoever might be sued, the promise *founded on such consideration is binding, if there be any person liable to suit, though the defendant himself be not liable. (*n*)

In general, a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise; (*o*) or of any equitable right; (*p*) and so it is, although it be a waiver of action for a tort, by committing which the person doing the wrong gained a benefit, although the other party suffered from it no real injury. (*q*)

And a promise to pay one if he would prove a debt

P. 579, it was *held* that if a person, employed by the administrator of a deceased debtor to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt.

(*m*) *Jones v. Ashburnham*, 4 East, 455; *Nelson v. Serle*, 4 M. & W. 795. In this case, to a declaration in debt on a promissory note for £24, dated 3d January, 1837, made by the defendant, payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in £24 for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon in compliance with his request, the defendant, after the death of J. W., for and in re-

spect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff, and that J. W. died intestate, and that at the time of the making and delivery of the note no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the defendant averred that *there never was any consideration for the said note except as aforesaid*. *Held*, that the plea was a good answer to the declaration.

(*n*) See *Jones v. Ashburnham*, 4 East, 455.

(*o*) *Stebbins v. Smith*, 4 Pick. 97; *Smith v. Weed*, 20 Wend. 184; *Haigh v. Brooks*, 2 Per. & Dav. 477, 3 Id. 452; *Farmer v. Stewart*, 2 New Hamp. 97; *Nicholson v. May*, Wright, 660; *Hinman v. Moulton*, 14 Johns. 466; *Williams v. Alexander*, 4 Ired. Eq. R. 207; *Waterman v. Barratt*, 4 Harring. 311.

(*p*) *Whitbeck v. Whitbeck*, 9 Cow. 266; *Thorpe v. Thorpe*, 1 Salk. 171, 12 Mod. 455.

(*q*) *Davis v. Morgan*, 4 B. & C. 8; *Brealey v. Andrew*, 2 Nev. & P. 114, 7 Ad. & El. 108.

against a deceased husband, (*r*) or to pay a debt denied to be due, if the party creditor would swear to it, rests upon a sufficient consideration. And in an action upon such promise, it has been held that the defendant cannot show that the plaintiff was mistaken or swore falsely. (*s*)

The incurring of a liability, in consequence of the promise of another, is held to be a good consideration; (*t*) and a subsisting legal obligation to do a thing is a good consideration for a promise to do that thing. (*u*)

*SECTION VI.

ASSIGNMENT OF DEBT.

An assignment of a debt or a right is a good consideration for a promise by the assignee. (*v*) Such assignment may not be good at law; but it is valid in equity; and courts of law, for many purposes, and to a certain extent, recognize the validity of the transfer, if the assignee obtains a benefit which the law considers a sufficient and a proper consideration to found a promise upon. (*w*) But if the transaction amounts to maintenance, which is illegal, the consideration fails, and the promise is void.

(*r*) *Traver v. —*, 1 Sid. 57.

(*s*) *Brooks v. Ball*, 18 Johns. 337.

(*t*) *Underhill v. Gibson*, 2 New Hamp. 352; *Homes v. Dana*, 12 Mass. 190; *Bryant v. Goodnow*, 5 Pick. 228. See also *Chapin v. Lapham*, 20 Pick. 467; *Blake v. Cole*, 22 Pick. 97; *Ward v. Fryer*, 19 Wend. 494. In *Baileyville v. Lowell*, 20 Maine, 178, it was determined that an agreement by the owner of an execution against the inhabitants of a town that if they would at once assess the amount required, and collect the same, he would make a certain discount, is founded on sufficient consideration, and will be enforced.

(*u*) *Cook v. Bradley*, 7 Conn. 57; *Warner v. Booge*, 15 Johns. 233; *Jewett v. Warren*, 12 Mass. 300. In *Russell v. Buck*, 11 Verm. 166, it was held that a promise by one already legally

liable for a debt, in consideration of such liability, to pay, if waited on a certain time, creates no new liability; and that a promise to pay the debt of another, if waited on a certain time, leaving the debt to be enforced during that time against the debtor, is not binding.

(*v*) *Loder v. Chesleyn*, 1 Sid. 212; *Mouldsdale v. Birchall*, 2 Wm. Bl. 820; *Price v. Seaman*, 4 B. & C. 525, 7 D. & R. 14; *Graham v. Gracie*, 13 Q. B. 548; *Whittle v. Skinner*, 23 Verm. 532; *Harrison v. Knight*, 7 Texas, 47; *Edson v. Fuller*, 2 Foster, 185.

(*w*) *Price v. Seaman*, 4 B. & C. 525, 7 D. & R. 14, 10 Moore, 34, 2 Bing. 437; *Peate v. Dicken*, 1 C. M. & R. 430, 5 Tyr. 116. And an assignment of a chose in action need not be by deed. *Howell v. Melvers*, 4 T. R. 690; *Health v. Hall*, 4 Taunt. 326.

SECTION VII.

WORK AND SERVICE.

Work and service are a very common consideration for a promise, and always sufficient, if rendered at the request of the party promising. (x) This request may often be implied; it is so generally, from the fact that the party making the promise accepts and holds the benefit resulting from the work or service. (y) And it is an equally sufficient consideration for a promise, if the work or service be rendered to a third party at the request of the promisor; (z) and such request will be often implied from very slight circumstances; as in the case of clothing supplied to a child, the mere knowledge and silence of the father are enough. (a)

If the work and service rendered are merely gratuitous, performed for the defendant without his request or privity, however meritorious or beneficial it may be, it affords no cause of action, (b) and perhaps no consideration for a sub-

(x) *Hunt v. Bate*, Dyer, 272, and notes; 1 Rol. Abr. 11, pl. 2, 3. In *Taylor v. Jones*, 1 Lord Raym. 312, it was held that giving a soldier leave of absence at the instance of a third person is a good consideration for a promise from him to the captain to bring him back in ten days, or pay a sum of money.

(y) 1 Wms. Saund. 264, note (1); *Tipper v. Bicknell*, 3 Bing. N. C. 710. In that case the declaration stated that defendants being in possession of certain mortgage deeds, of which H. R. was desirous to obtain an assignment by the payment of £500, the plaintiff consented at H. R.'s request to accept bills to that amount drawn by H. R., upon H. R.'s procuring the defendants to deliver the mortgage deeds to the plaintiff as security; that the defendants, in consideration of the plaintiff accepting the bills, undertook to deliver the deeds to him upon his paying them the amount of the bills. Held a sufficient consideration for the defendant's promise.

(z) See cases cited *supra*, n. (x.)

(a) *Law v. Wilkin*, 6 Ad. & El. 718; *Nichole v. Allen*, 3 C. & P. 36. See, however, *Mortimore v. Wright*, 6 M. & W. 485, where Lord Abinger denies these cases to be sound law. It is a question for the jury whether the circumstances are sufficient in any particular case. *Baker v. Keen*, 2 Stark. 501. See farther, as to this point, *ante*, p. 247, n. (n.) *et seq.*

(b) *Hunt v. Bate*, Dyer, 272, a; 1 Rol. Abr. 11, pl. 1; *Hayes v. Warren*, 2 Str. 933; *Roscorla v. Thomas*, 3 Q. B. R. 234; *Jeremy v. Goochman*, Cro. Eliz. 442; *Dogget v. Vowell*, Moore, 643. See also *ante*, p. 358, n. (h).—So in *Frear v. Hardenbergh*, 5 Johns. 273, where A. entered on land belonging to B., and without his knowledge or authority cleared it, made improvements, and erected buildings, and B. afterwards promised to pay him for the improvements he had made, it was held that, the work having been done and the improvements made without the request of B., the promise was a *nudum pactum*, on which no action could be maintained. — But perhaps the strong-

sequent promise, although, as we have seen, a precedent request may in law be presumed from the promisor's acceptance of the service. So if a workman employed and directed to do a particular thing choose to do some other thing, without the direction or assent of the employer, the implied promise of the employer to pay for his labor will not extend to the new work; (c) but being accepted by the employer, it would be a sufficient consideration for a promise to pay for it, and such acceptance might imply such promise.

*SECTION VIII.

TRUST AND CONFIDENCE.

Trust and confidence in another often form a sufficient consideration to hold that other to his undertaking. As if one intrusts money, goods, or property of any kind, to any person, on the faith of that person's promise to act in a certain way in reference to those goods, or that money or property, such person, having accepted the trust, will be held to his promise, because the trust is itself a sufficient consideration for a promise to discharge and execute the trust faithfully. (d) For if a person makes a mere gratuitous promise,

est case to be found in the American reports, in illustration of this principle, is that of *Bartholomew v. Jackson*, 20 Johns. 28. A. owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, A. sent a message to B., requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. B. having agreed to remove the stack by ten o'clock the next morning, A. waited till that time, and then set fire to the stubble in a remote part of the field. The fire spreading rapidly, and B. not appearing to remove the stack, A. removed it for him. *Held*, that as A. performed the service without the privity or request of B., he was not entitled to recover for it.

(c) *Hort v. Norton*, 1 McCord, 22.

See also *Phetteplace v. Steere*, 2 Johns. 442.

(d) *Doctor & Stud. Dial. 2, c. 24; Holt, C. J., in Coggs v. Bernard*, 2 Ld. Raym. 919. Thus, where a coffee-house keeper accepted a large sum of money from the plaintiff, and promised to take proper care of it for a certain period, it was holden that an action would lie on this promise for gross neglect and want of caution, whereby the money was lost. *Doorman v. Jenkins*, 2 Ad. & El. 256. So where the plaintiff delivered the sum of £700 to the defendant, to be laid out by him in the purchase of an annuity, and the defendant promised to get the annuity *well and properly secured*, but was guilty of gross neglect and want of care, whereby both the money and the annuity were lost, it was holden that the plaintiff was entitled to maintain an action against the defendant, to recover compensation for

and then enters upon the performance of it, he is held to a full execution of all he has undertaken. Questions involving this principle seldom arise except in the case of bailments, and will be considered hereafter when we treat of that subject. Here we will say only, that, in general, an agent *without remuneration cannot be required to undertake an employment or trust, or held liable for not doing so; but if he undertake and begin it, he is liable for the consequences of neglect or omission in completing his work.

SECTION IX.

A PROMISE FOR A PROMISE.

A promise is a good consideration for a promise. (e) And it is so previous to performance and without performance. As if one promises to become partner in a firm, and another

the injury he had sustained, although the defendant was to receive *no reward* for his services. *Whitehead v. Gree-tham*, 10 Moore, 182, 2 Bing. 464, McClel. & Y. 205. In the absence of an express undertaking to procure *good* security, the party would only be bound to use reasonable care and caution, *Dartnall v. Howard*, 6 D. & R. 443, 4 B. & C. 345. In *Shillibeer v. Glyn*, 2 M. & W. 143, the declaration stated that the plaintiff being about to proceed to Northampton, paid money to the defendants in London, that they might cause it to be paid to him at Northampton on a certain day; that the defendants received the money for that purpose from the plaintiff, and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at Northampton. The court were inclined to hold that the declaration disclosed a sufficient consideration. See also the case of *Wheatley v. Law*, Cro. Jac. 668, where a similar declaration was held good, if the case is correctly reported. Where the defendant received certain notes from the plaintiff to collect or return, it was held that the delivery of the notes constituted a consideration for the defendant's agreement, and that if he neglected to use ordinary

diligence in endeavoring to collect them, he was liable therefor to the plaintiff. *Robinson v. Threadgill*, 13 Ire. L. 39. And where the plaintiff intrusted "divers boilers of great value" to the defendant, to be weighed, and the defendant promised to return them in the same state and condition that they were in at the time he received them, but sent them back in detached pieces and unfit for use, it was holden that the plaintiff was entitled to maintain an action on the promise, to recover compensation for the injury he had sustained. *Bainbridge v. Firmston*, 1 P. & D. 3; and see *Smith's Leading Cases*, vol. i. p. 96, ed. 1841.

(e) *Nichols v. Raynbred*, Hob. 88; *Hebden v. Rutter*, 1 Sid. 180; *Strangborough v. Warner*, 4 Leon. 3; *Gower v. Capper*, Cro. El. 543; *Parke, J.*, in *Wentworth v. Bullen*, 9 B. & C. 840; *Cartwright v. Cooke*, 3 B. & Ad. 703; *Miller v. Drake*, 1 Caines, 45; *James v. Fulcro*, 5 Tex. 512. So in *White v. Demilt*, 2 Hall, 405, it was held that in an action for the breach of the defendant's contract to sell and deliver certain goods to the plaintiff, the *promise* of the latter to *accept* the goods and *pay* for them is a good consideration for the defendant's promise to *deliver* them. So in *Howe v. O'Mally*, 1

promises to receive him into the firm, both of these promises are binding, each being a sufficient consideration for the other. (*f*) If one promises to teach a certain trade, this is a consideration for a promise to remain with the party a certain term of time to learn, and serve him during that time; but, without such promise to teach, the promise to remain and serve, though it be made in expectation of instruction, is void. (*g*) The reason of this is, that a promise is not a *good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement. (*h*)

Murph. 287, A. conveyed to B. a tract of land, containing 221 acres, more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than 221 acres, the defendant should pay the plaintiff ten dollars per acre for the excess; if it fell short, the plaintiff to refund to the defendant at the same rate. Here are mutual promises, and one is a good consideration to support the other.

(*f*) *McNeill v. Reed*, 2 Moore & Scott, 89; S. C. 9 Bing. 68.

(*g*) Thus, where the defendant had signed a written agreement to the following effect: "I hereby agree to remain with Mrs. Lees, of 302 Regent Street, Portland Place, for two years from the date hereof, for the purpose of learning the business of a dressmaker, &c. As witness my hand, this 5th day of June, 1826," it was *held*, that as the agreement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as a consideration or inducement for the defendant's remaining two years in her service, it was a *nudum pactum*; and that no action, consequently could be brought upon it against the defendant for leaving her mistress, and commencing business on her own account before the expiration of the two years. *Lees v. Whitcomb*, 2 M. & P. 86, 5 Bing. 34. So, where the written agreement was in the following terms: "Memorandum of an agreement made the 17th of August, 1833, by which I, William Bradley of Sheffield, do agree that I will work for and with John Sykes, of Sheffield aforesaid, manufacturer of powder-flasks and other articles, at and in such work as he

shall order and direct, and no other person whatsoever, from this day henceforth, during and until the expiration of twelve months, and so on from twelve months end to twelve months end, until I shall give the said John Sykes twelve months notice in writing that I shall quit his service," it was *held*, that as this engagement was entirely unilateral, and nothing was to be given or done by John Sykes as a consideration for Bradley's promise to work for him by the year, and no one else, the agreement was a *nudum pactum*, and could not be enforced. *Sykes v. Dixon*, 9 Ad. & El. 693, 1 P. & D. 463. See also *Bates v. Cort*, 3 D. & R. 676. So where the defendant signed the following instrument: "Mr. James —, as you have a claim on my brother for £5 17s. 9d. for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th January, 1833," it was *held*, that the promise being without consideration, was a *nudum pactum*, and gave no cause of action. *James v. Williams*, 5 B. & Ad. 1109.

(*h*) *McKinley v. Watkins*, 13 Ill. 140; *Lester v. Jewett*, 12 Barb. 502; *Nichols v. Raynbred*, Hob. 88; *Kingston v. Phelps, Peake*, 227; *Biddell v. Dowse*, 6 B. & C. 255; *Hopkins v. Logan*, 5 M. & W. 241; *Dorsey v. Rockwood*, 12 Howard, 126. This necessity for the mutuality of the obligation, in order to render either party bound, is well illustrated by the later case of the Governor, &c. of Copper Miners v. Fox, 3 E. L. & E. 420, 20 Law Journ. 174. In that case a corporation brought an action on an executory contract, seeking to recover damages for its non-performance. The declaration stated,

This has been doubted, from the seeming want of mutuality in many cases of contract. As where one promises to see another paid, if he will sell goods to a third person; or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings or the like. (i) Here it

that in consideration that the plaintiffs would sell to the defendants iron rails, the defendants agreed to furnish to the plaintiffs sections of the said railways, averring mutual promises, and alleging as a breach the non-delivery of the sections by the defendants. It appeared that the plaintiffs were incorporated by a charter, for the purpose of carrying on the business of copper miners, and that the contract in question, which was not under seal, had been made by an agent on behalf of the plaintiffs with the defendants. *Held*, that the action could not be maintained by the corporation, as the contract was not under seal, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed; that the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation; that no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority; and that, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendants' promise, the corporation could not sue upon the contract. And *semble*, that the doctrine cannot be supported, that a corporation may sue as plaintiff upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. At all events such an estoppel could only support an action of covenant, as upon a contract under seal. See also editor's note on p. 426. — If, however, a contract like the above, although not originally binding upon one party, by reason of some defect or informality in the execution, or for any other cause, and therefore not *originally* binding upon the other party, nevertheless be *executed* by the party not originally liable, the other party cannot refuse performance on the

ground that the contract was not originally binding. *Fishmonger's Company v. Robertson*, 5 M. & Gr. 131. In like manner in *Phelps v. Townsend*, 8 Pick. 392, (1829), where the defendant, by an agreement signed only by himself, had placed his son as an apprentice to the plaintiffs to learn the art of printing, therein promising that his son should stay with them until he was twenty-one, &c.; which the son failed to perform. On the trial the defendant objected that the contract was void for want of mutuality, it not being signed by the plaintiffs, and that there was no obligation on the plaintiffs to do any thing which might form a consideration for the defendant's promise. But the court said, "*that the acceptance of the contract by the plaintiffs, and the execution of it in part by receiving the apprentice, created an obligation on their part to maintain and instruct the defendant's son.*" See also *Commercial Bank v. Nolan*, 7 How. (Miss.) 508.

(i) In *Kennaway v. Treleavan*, 5 M. & W. 501, *Parke*, Baron, is reported to have said, (while discussing the sufficiency of the consideration for a guaranty which was in these terms:—"Truro, July 12th, 1838. Messrs. Kennaway & Co. Gentlemen—I hereby guarantee to you, Messrs. Kennaway & Co., the sum of £250, in case Mr. Padon, of &c., should default in his capacity of agent and traveller to you. William S. Treleavan.") "There is a case in the books, of *Newbury v. Armstrong*, 6 Bing. 201, which strongly resembles the present. There the guarantee was in these terms: 'I agree to be security to you for T. C. for whatever, while in your employ, you may trust him with, and in case of default to make the same good;' and the contract was held to be good, on the ground that the future employment of the party was a sufficient consideration. It is said, and truly, that in the present case there was no binding contract on the plaintiffs, and that, notwithstanding the guaran-

is said that the party making the promise is bound, while the other party is at liberty to do any thing or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee within a reasonable time engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee which is sufficient to bind him, then the promisor is *bound also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing, in a way which binds him to complete it, here also is a mutuality of obligation. But if without any promise whatever the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until that other party does the thing required of him.

A very large proportion of our most common contracts rests upon this principle. Thus, in the contract of sale, the proposed buyer says, I will give you so much for these goods; and he may withdraw this offer before it is accepted, and if his withdrawal reaches the seller before the seller has accepted, the obligation of the buyer is extinguished; but if not withdrawn it remains as a continuing offer for a reason-

tee, they were not bound to employ Paddon. But a great number of the cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guarantee falls under that class, when a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guarantee; but if he do employ him, then the guarantee attaches and becomes binding on the

party who gave it. It is therefore no objection in the present case to say that the plaintiffs were not obliged to take Paddon into their service; they might do so or not, as they pleased; but having once done so, the guarantee attaches, and the defendant becomes responsible for the default." See also *Yard v. Eland*, 1 *Ld. Raym.* 368. *L'Amoureux v. Gould*, 3 *Selden*, 349. The binding obligation of contracts or promises to do something, provided, or on condition, or when the other party shall do some other thing, is also recognized in *Mozley v. Tinkler*, 1 *Cr. Mees. & Ros.* 692.

able time, and, if accepted within this time, both parties are now bound as by a promise for a promise; there is an entire mutuality of obligation. The buyer may tender the price and demand the goods, and the seller may tender the goods and demand the price. (*j*) This subject, however, belongs rather to the topic "Assent."

A written agreement to submit disputes and claims to arbitration must be signed by all parties, or it is obligatory upon none. For no party can hold another to the award, without showing that he himself would have been equally bound by it. (*k*)

It should be added that the common law makes an exception to this requirement of mutuality, in the case of contracts between infants and persons of full age; following in this respect the civil law, and the law prevailing on the continent of Europe. The infant is not bound, while the adult is; the infant may avoid his contract, but the adult cannot. (*l*) This rule has been applied to the contract of future marriage, as well as to other contracts. Where a man of full age enters into such contract with a woman who is a minor, if he breaks the contract she has her remedy by action. (*m*) If she breaks it he has no action. But a woman under age may perhaps be bound by a marriage contract properly securing her interests, and deliberately entered into, with the approbation of her parents or guardians. (*n*)

(*j*) Thus, in *White v. Demilt*, 2 Hall, 405, the plaintiff brought an action for the non-delivery of certain goods sold him by the defendant. One ground of defence was want of consideration for the defendant's promise. But the court said the promise of the plaintiff to accept and pay for the goods was a good consideration for the defendant's promise to deliver them. See also *Babcock v. Wilson*, 17 Maine, 372; *Appleton v. Chase*, 19 Maine, 74.

(*k*) *Kingston v. Phelps, Peake*, 227; *Biddell v. Dowse*, 6 B. & C. 255, 9 D. & R. 404; *Antram v. Chace*, 15 East, 212.

(*l*) See *ante*, p. *276.

(*m*) *Holt v. Ward Clarendieux*, 2 Str. 937; *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 Cow. 22; *Cannon v. Alsbury*, 1 A. K. Marsh. 78.—So an infant may maintain an action on a mercantile contract, although he would not be bound himself. *Warwick v. Bruce*, 2 M. & S. 205.

(*n*) *Ainslie v. Medlycott*, 9 Ves. 14; *Simson v. Jones*, 2 R. & Mylne, 365; *Durnford v. Lane*, 1 Bro. C. C. 111; *Fonblanque on Eq.* 74; and see *ante*, p. 277.

SECTION X.

SUBSCRIPTION AND CONTRIBUTION.

Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others. (o) If there be a chartered company or corporation, one who subscribes agreeably to the statute and by-laws acquires a right to his shares; and as the company is under an obligation to give him the shares, this would be a consideration for the promise, and would make his subscription obligatory on him. (p)

(o) *Society in Troy v. Perry*, 6 New Hamp. 164; *George v. Harris*, 4 New Hamp. 533; *Hanson v. Stetson*, 5 Pick. 506; *State Treasurer v. Cross*, 9 Verm. 289; *University of Vermont v. Buell*, 2 Verm. 48; *Commissioners v. Perry*, 5 Ham. 58. — It is on this ground that subscriptions to charitable or benevolent objects have often been held binding, when there was no other consideration for each subscriber's promise than the promise of other subscribers. It must be confessed, however, that there are many authorities which seem to hold it necessary in such cases that there shall be some promise or engagement by the committee, corporation, or other person to whom the subscription paper runs, or that something should be done on their part, as the erection of the building, providing materials or the like, in order to render the subscription binding. The cases of *Limerick Academy v. Davis*, 11 Mass. 114; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Troy Academy v. Nelson*, 24 Verm. 189; *Barnes v. Perine*, 9 Barb. 202; *Wilson v. Baptist Education Soc.* 10 Barb. 309; *Galt's Exrs. v. Swain*, 9 Gratt. 633; and others, favor this view. See also No. 42 Am. Jur. 281–283; *Foxcroft Academy v. Favor*, 4 Greenl. R. 382, (Bennett's ed.) and note. This point was very fully discussed in the late case of *Hamilton College v. Stewart*, 2 Den. 403, and 1 Comst. 581. It was there held, that the endowment of a literary institution is not a sufficient consideration to uphold a subscription to a

fund designed for that object. And although there is annexed to the subscription a condition that the subscribers are not to be bound unless a given amount shall be raised, no request can be implied therefrom against the subscribers that the institution shall perform the services and incur the expenses necessary to fill up the subscription. Accordingly, where the defendant subscribed \$800 to a fund for the payment of the salaries of the officers of *Hamilton College*, and a condition was annexed that the subscribers were not to be bound unless the aggregate amount of subscriptions and contributions should be \$50,000; it was held, that there was no consideration for the undertaking, and that no action would lie upon it, although there was evidence tending to show that the whole amount had been subscribed or contributed according to the terms of the condition. But see *Barnes v. Perine*, 9 Barb. 202; *Johnston v. Wabash College*, 2 Cart. (Ind.) 555.

(p) *Chester Glass Company v. Dewey*, 16 Mass. 94. In this case certain individuals having associated in writing for the purpose of carrying on a particular manufacture, and being afterwards incorporated for the same purpose, one, who subscribed the writing after the incorporation, became thereby a member of the corporation, and was held to pay the sum he had subscribed. But where one subscribed an agreement to take shares in a corporation after the passage of the act of incorpo-

On the important question, how far voluntary subscriptions for charitable purposes, as for alms, education, religion, or other public uses, are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established. (q) Farther than this it is not easy to go, unless such subscriptions are held to be binding merely on grounds of public policy. To say that they are obligatory because they are all promises, and the promise of each subscriber is a valid consideration for the promise of every other, seems to be reasoning in a vicious circle. The very question is, are the promises binding; for if not then they are no consideration for each other. To say that they are binding, because they are such considerations, is only to say that they are binding because they are binding; it assumes the very thing in question. (r)

ration, but before any meeting of the persons incorporated and their associates, it was *held*, that such agreement could furnish no evidence of a contract with the corporation. *New Bedford Turnpike v. Adams*, 8 Mass. 138. And there is no privity of contract between a party signing and a committee appointed by his co-signers at a meeting which he did not attend; although the committee proceeded and expended money. *Curry v. Rogers*, 1 Foster, 247.

(q) *Bryant v. Goodnow*, 5 Pick. 228; *Warren v. Stearns*, 19 Pick. 73; *Robertson v. March*, 3 Scam. 198; *Macon v. Sheppard*, 2 Humph. 335; *University of Vermont v. Buell*, 2 Verm. 48; *Canal Fund v. Perry*, 5 Ham. 58; *Barnes v. Perine*, 9 Barb. 202; *Homes v. Dana*, 12 Mass. 190. In this last case sundry persons agreed to lend to the editors of the *Boston Patriot* the sums set against their names, which were to be paid to one of their number as agent. This agent therefore made advances to the editors, and it was *held* that he had an

action against each subscriber. The court said the only question which could arise in the case was, whether Larkin was induced to advance his money by the subscription. See also *Thompson v. Page*, 1 Met. 570, and *Farmington Academy v. Allen*, 14 Mass. 172.

(r) That such subscriptions are valid where no expenses or liabilities are incurred because of them, and on the ground of mutuality of promise, seems to be at least implied in some cases. See *George v. Harris*, 4 N. H. 533. From this case it would appear that such a subscription may at all events be treated as an agreement of the subscribers by and with each other, upon the failure to perform which by any one of them, the others can join in an action of *assumpsit* against him to recover the amount of his subscription. See also *Society in Troy v. Perry*, 6 New Hamp. 164; *Same v. Goddard*, 7 New Hamp. 435; *Fisher v. Ellis*, 3 Pick. 323; *Amherst Academy v. Cows*, 6 Pick. 427. In the last two cases a promissory note was given in discharge of the subscrip-

In general, subscriptions on certain conditions in favor of the party subscribing are binding when the acts stipulated as conditions are performed. (*s*)

SECTION XI.

OF CONSIDERATION VOID IN PART.

It sometimes happens that a consideration is void in part; and the question arises whether this fact makes the whole consideration invalid, and the promise itself of no obligation. If one or more of several considerations, which are recited as the ground of a promise, be only frivolous and insufficient, but not illegal, and others are good and sufficient, then undoubtedly the consideration may be severed, and those which are void disregarded, while those which are valid will sustain the promise. (*t*) But where the consideration is entire and incapable of severance, then it must be wholly good or wholly bad. If the promise be entire, and not in writing, and a part of it relate to a matter which by the statute of frauds should be promised in writing, such part, being void, avoids the whole contract; (*u*) but if it be such in its nature that it may

tion. But it is not easy to see how that strengthened the obligation. In *Ives v. Sterling*, 6 Met. 310, the court notice the conflict of opinion, without attempting to reconcile it. In New York the authorities are in similar conflict. See *Whitestown v. Stone*, 7 Johns. 112; *McAuley v. Billinger*, 20 Johns. 89. In *Stewart v. Trustees of Hamilton College*, 1 Comst. 581, 2 Denio, 403, *Walworth*, Chancellor, had held, that where several persons subscribe for an object in which all are interested, as the support of institutions of religion or learning in the community where they reside, the promise of each subscriber is the consideration of the promise of each other. But the Court of Appeals does not appear to adopt this view. It was held, however, in both courts, that if the trustees agreed to endeavor to raise a certain sum in consideration of the subscription, this would make it binding. There are

cases so obscurely stated that it is not easy to see whether the court intend to say that such subscriptions are binding without the proof of expense or liability actually incurred in consequence of them. See *Caul v. Gibson*, 3 Barr, 416; *Collier v. Baptist Educational Society*, 8 B. Monroe, 68; *Barnes v. Perine*, 9 Barb. 202.

(*s*) *Williams College v. Danforth*, 12 Pick. 541.

(*t*) *Parish v. Stone*, 14 Pick. 198; *King v. Sears*, 2 C. M. & R. 48; *Jones v. Waite*, 5 Bing. N. C. 341; *Sheerman v. Thompson*, 11 Ad. & El. 1027; *Best v. Jolly*, 1 Sid. 38; *Cripps v. Golding*, 1 Rol. Abr. 30, *Action sur Case*. pl. 2; *Bradburne v. Bradburne*, Cro. Eliz. 149; *Coulston v. Carr*, Id. 848; *Crisp v. Gamel*, Cro. Jac. 127; *Shackell v. Rosier*, 2 Bing. N. C. 646, per *Tindal*, C. J.

(*u*) *Mechelen v. Wallace*, 7 Ad. & El. 49, 2 N. & P. 224. Here the declaration stated that defendant wished

be divided and the part not required to be in writing by the statute may be enforced without injustice to the promisor, that portion of the agreement will be binding. (*uu*)

* SECTION XII.

ILLEGALITY OF CONSIDERATION.

In general, if any part of the entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. (*v*) But a distinction must be taken between the cases in which the consideration is illegal in part, and those in which the promise founded on the consideration is illegal in part. If any part of a consideration is illegal, the whole consideration is void; because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal. But if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other

plaintiff to hire of her a house, and furniture for the same, at the rent of, &c.; and thereupon, in consideration that plaintiff would take possession of the said house partly furnished, and would, if complete furniture were sent into the said house by defendant in a reasonable time, become tenant to defendant of the said house, with all the said furniture, at the aforesaid rent, and pay the same quarterly from a certain day, to wit, &c., defendant promised plaintiff to send into the said house, within a reasonable time after plaintiff's taking possession, all the furniture necessary, &c. *Held*, that the defendant's agreement to send in furniture was an inseparable part of a contract for an interest in lands, and therefore came within stat. 29, Car. 2, which, in such case, requires the agreement, or a memorandum thereof, to be in writing. See also *Chater v. Beckett*, 7 T. R. 203; *Lord Lexington v. Clarke*, 2 Vent. 223; *Thomas v. Wil-*

liams, 10 B. & C. 664; *Wood v. Benson*, 2 Tyr. 93; *Mayfield v. Wadsley*, 3 B. & C. 357; *Forgret v. Moore*, 16 E. L. & E. 466; *Irvine v. Stone*, 6 Cush. 508.

(*uu*) *Irvine v. Stone*, 6 Cush. 508; *Wood v. Benson*, 2 Tyr. 93; *Rand v. Mather*, Boston Monthly Law Reporter, Sept. 1854.

(*v*) *Collins v. Blantern*, 2 Wilson, 347; *Benyon v. Nettlefold*, 2 E. L. & E. 113; *Donallen v. Lennox*, 6 Dana, 91; *Brown v. Langford*, 3 Bibb, 500; *Hinesburgh v. Sumner*, 9 Verm. 23; *Armstrong v. Toler*, 11 Wheat. 258; *Woodruff v. Hinman*, 11 Verm. 592; *Deering v. Chapman*, 22 Maine, 488; *Filson v. Himes*, 5 Barr, 452; *Dedham Bank v. Chickering*, 4 Pick. 314; *Coulter v. Robertson*, 14 Sm. & M. 18; *Gamble v. Grimes*, 2 Cart. (Ind.) 392. See also *Howden v. Simpson*, 10 Ad. & El. 815; *Hall v. Dyson*, 10 E. L. & E. 424.

illegal, he shall be held to do that which is legal, (*w*) unless the two are so mingled and bound together that they cannot be separated; in which case the whole promise is void.

A distinction has been taken between the partial illegality of a consideration when against a statute, and when against common law. There are cases which sustain this distinction, (*x*) but we think it rests upon no sound principle. A *statute has no more power in avoiding a contract partially opposed to it than the common law, (*y*) unless it contain an express provision that all such agreements shall be wholly void, (*z*) and then the contract is void although a promissory note in the hands of an innocent indorsee. (*zz*) But, while the law is sufficiently distinct where the whole consideration or the whole promise is illegal, questions still remain, where

(*w*) Thus in the *Bishop of Chester v. John Freeland*, *Ley*, 79, *Hutton*, J., lays down the rule that when a good thing and a void thing are put together in the same grant, the common law makes such construction that the grant shall be good for that which is good, and void for that which is void. This principle is also distinctly recognized in *Kerrison v. Cole*, 8 East, 236. See also *Norton v. Simmes*, Hob. 14. And in the late case of *Leavitt v. Palmer*, 3 Comst. 37, *Bronson*, J., said:—"It is undoubtedly true that where a deed or other contract contains distinct undertakings, some of which are legal and some illegal, the former will be in certain cases upheld, though the latter are void." And the principle was fully recognized in a late case before the Privy Council. *Bank of Australasia v. Bank of Australia*, 12 Jur. 189, 6 E. F. Moore, 152. See also *Chase's Ex. v. Burkholder*, 18 Penn. 50.

(*x*) *Norton v. Simmes*, Hob. 14; *Mallever v. Redshaw*, 1 Mod. 35. *Twisden*, J.; Com. Dig. Covenant, (F.); Bac. Abr. Conditions, (K.); *Hackett v. Tilly*, 11 Mod. 93; *Butler v. Wigge*, 1 Wms. Saund. 66; a. n. 1; 1 Pow. on Cont. 199; *Lee v. Coleshill*, Cro. Eliz. 529; *Pearson v. Humes*, Carter, 230; *Mosdell v. Middleton*, 1 Vent. 237; *Van Dyck v. Van Beuren*, 1 Johns. 362.

(*y*) The merit of exploding this venerable error of supposing a distinction between contracts void by statute and contracts void at common

law, belongs to the Hon. Theron Metcalf of Massachusetts, who with his well known acuteness and accuracy has pointed out the origin of the error, and shown its fallacy. 23 Am. Jur. 2. And it may now be considered as fully established, that although a contract contain some provisions or promises which are void by statute, yet, if it also embrace other agreements which would be, if standing alone, valid, they may still be enforced. See *Monys v. Leake*, 8 T. R. 411; *Kerrison v. Cole*, 8 East, 231; *Doe v. Pitcher*, 6 Taunt. 359; *Greenwood v. Bishop of London*, 5 Taunt. 727; *Newman v. Newman*, 4 M. & S. 66; *Wigg v. Shuttleworth*, 13 East, 87; *Gaskell v. King*, 11 East, 165; *Howe v. Synge*, 15 East, 440; *Tinckler v. Prentice*, 4 Taunt. 549; *Fuller v. Abbott*, 4 Taunt. 105; *Shackel v. Rosier*, 2 Bing. N. C. 646; *Jones v. Waite*, 5 Bing. N. C. 841. The recent case of *Jarvis v. Peck*, 1 Hoff. 479, so far as it may be considered as having recognized any distinction of this kind, is not in our opinion sound law.

(*z*) Thus, where the statute declares a certain contract to be "void to all intents and purposes whatever," it has been held that if such a contract also contain stipulations not within the intent of the statute, the latter will be considered void by force of the statute. See *Crosley v. Arkwright*, 2 T. R. 603; *Dann v. Dolman*, 5 T. R. 641.

(*zz*) *Bridge v. Hubbard*, 15 Mass. 96; *Hay v. Ayling*, 3 E. L. & E. 416 & note.

the illegality is but partial, which can only be determined by further adjudication.

Where the consideration is altogether illegal, it is insufficient to sustain a promise, and the agreement is wholly void. This is so equally, whether the law which is violated be statute law or common law. It has been held in England, (a) that where a statute provided a penalty for an act, without prohibiting the act in express terms, there the penalty was the only legal consequence of a violation of the law, and a contract which implied or required such violation was nevertheless valid. But Lord Holt (b) denied the doctrine; and Sir James Mansfield established a better rule of law, (c) holding that where a statute provides a penalty for an act, this is a prohibition of the act. We apprehend that this has always *been the prevailing, if not the uncontradicted rule of law, on this subject, in this country. (d)

(a) *Comyns v. Boyer*, Cro. Eliz. 485; and see *Gremare v. Le Clerk Bois Valon*, 2 Camp. 144.

(b) *Bartlett v. Vinor*, Carth. 252, Skin. 322. *Holt*, C. J., here said:—"Every contract made for or about any matter or thing which is prohibited, and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

(c) *Drury v. Defontaine*, 1 Taunt. 136.

(d) This principle is sustained by numerous adjudged cases. *Wheeler v. Russell*, 17 Mass. 258; *Coombs v. Emery*, 14 Maine, 404; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. De Grand*, 15 Mass. 39; *Seidenbender v. Charles*, 4 Serg. & Rawle, 159; *Mitchell v. Smith*, 1 Binn. 118; *Sharp v. Teese*, 4 Halst. 352; *De Begnis v. Armistead*, 10 Bing. 107, 3 Moore & Scott, 516; *Cope v. Rowlands*, 2 M. & W. 149; *Fergusson v. Norman*, 5 Bing. N. C. 86; *Territt v. Bartlett*, 21 Verm. 184; *Bancroft v. Dumas*, 21 Verm. 456; *Bell v. Quin*, 2 Sandf. 146; *Eberman v. Reitzell*, 1 Watts & Serg. 181; *Hale v. Henderson*, 4 Humph. 199; *Elkins v. Parkhurst*, 17 Verm. 105.—

And the repeal of a prohibitory act will not *per se* render valid a contract made during the existence of the act, contrary to its provisions. But the legislature may give a remedy by express enactment. *Milne v. Huber*, 3 McLean, 212. A recent application of the general principle of the text was made in *Jackson v. Walker*, 5 Hill, 27. By the laws of New York every contribution of money intended to promote the election of any person or ticket is prohibited by the statute, (1 R. S. 136, § 6,) except for defraying the expenses of printing, and the circulation of votes, handbills, and other papers, previous to such election; and this, whether the immediate purpose for which the money is designed be in itself corrupt or not. Accordingly, where the defendant agreed to pay the plaintiff \$1000, in consideration that the latter, who had built a log cabin, would keep it open for the accommodation of political meetings to further the success of certain persons nominated for members of Congress, &c., it was held that the agreement was illegal, and could not be enforced. See also the recent case of *Cundell v. Dawson*, 4 C. B. 376. In this case the same principle was applied, but *Wilde*, C. J., intimated that statutes enacted simply for the security of the revenue did not come within the principle. And in *Smith v. Mawhood*,

SECTION XIII.

IMPOSSIBLE CONSIDERATIONS.

Impossible considerations are wholly bad and insufficient. We have seen that a consideration which one cannot perform without a breach of the law is bad, and so is one which cannot be performed at all. (e) The reason is obvious; from

14 M. & W. 452, it was *held* that the excise act requiring certain things of dealers in tobacco did not avoid a contract of sale of tobacco by one not complying with these requisitions, as their effect is only to impose a penalty. But where it appears to be the intention of the legislature to prohibit a contract as well as to impose a penalty for making it, such contract is illegal and void, although the prohibition be intended only for purposes of revenue.

(e) 5 Vin. Abr. 110, 111, Condition, (C.) a. (D.) a; 1 Rol. Abr. 419; Co. Litt. 206, a; 2 Bl. Com. 341; Shep. Touch. 164. See 22 Am. Jur. 20-22. In *Nerot v. Wallace*, 3 T. R. 17, a promise was made by the defendant to the assignees of a bankrupt, when the latter was on his last examination, that in consideration that the assignees would forbear to have the bankrupt examined, and that the commissioners would desist from taking such examination touching moneys alleged to have been received by the bankrupt, and not accounted for, he, the defendant, would pay such money to the assignees. This promise was held by the court to be *illegal*, as being against the policy of the bankrupt laws. And Lord *Kenyon* observed:—"I do not say that this is *nudum pactum*; but the ground on which I found my judgment is this, that every person, who in consideration of some advantage, either to himself or to another, promises a benefit, must have the *power of conferring that benefit up to the extent to which that benefit professes to go, and that not only in fact, but in law*. Now the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform, because the commissioners had nevertheless a right

to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them. The assignees did not stipulate only for their own acts, but also that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement." And *Ashurst, J.*, observed:—"In order to found a consideration for a promise, it is necessary that the party by whom the promise is made *should have the power of carrying it into effect*, and secondly, that the thing to be done should in itself be legal. Now it seems to me that the consideration for this promise is void, on both these grounds. The assignees have no right to control the discretion of the commissioners; and it would be criminal in them to enter into such an agreement, because it is their duty to examine the bankrupt fully, and the creditors may call on them to perform it. And for the same reason the thing to be done is also illegal."—And so in *Bates v. Cort*, 2 B. & C. 474, which may perhaps be regarded as an extreme case, the declaration stated, that by agreement between the plaintiff and G. G., the plaintiff agreed to sell and deliver to G. G. a lace machine for £220, to be paid thus: £40 on delivery, and the residue by weekly payments of one pound, which were to be paid to the defendant as trustee for the plaintiff, and in case of any default the plaintiff was to have back the machine, and in consideration of the premises, and of the plaintiff at the request of the defendant appointing him to receive the weekly instalments, the defendant promised to take the machine and pay the balance, should there be any default in G. G. in

such consideration no possible benefit or advantage could be derived to the one party, and no detriment to the other, and if that which is offered or provided as a consideration cannot happen, the mere words alone are a nullity. It is undoubtedly possible, that one may make a promise which it is utterly impossible to perform, and nevertheless the promisee may derive a positive advantage from the mere fact that the promise is made. In such a case, supposing the transaction free from all taint of fraud, this advantage would be a good consideration, but not the promise by itself.

But a promise is not void, merely because it is difficult, or even improbable. And it seems that if the impossibility *applies to the promisor personally, there being neither natural impossibility in the thing, nor illegality nor immorality, then he is bound by his undertaking, and it is a good consideration for the promise of another. (f) The reason of this

the weekly payments. It was *held* that this promise was *nudum pactum*, and void. And by the court:—"The declaration affects to show the legal operation of the agreement. Now that states that the agreement bound the defendant to take the machine, not the plaintiff to deliver it. The declaration does not even show that it was in the plaintiff's power to deliver the machine, for it is not stated that he had ever got it back from the original vendee. There certainly is an allegation of willingness to let the defendant take the machine, but that does not appear to have been in pursuance of any preëxisting agreement, nor does the whole import any obligation on the plaintiff to let the defendant take it. The declaration is therefore bad, no sufficient consideration for the defendant's promise being shown."

(f) See Co. Litt. 206, a, n. 1; Platt on Cov. 569; 3 Chitty on Com. Law, 101; Blight v. Page, 3 B. & P. 296, note; Worsley v. Wood, 6 T. R. 718, Kenyon, C. J. And see Tufnell v. Constable, 7 Ad. & El. 798, *arguendo*. In this case there was a covenant to invest a sum in bank annuities, or other government stock, in the corporate names of the archdeacon of C., the vicar of W., and the churchwardens of W., the dividends to be held and received by the archdeacon, vicar, and churchwardens,

for the time being, in trust for the support of a parish school for poor children, and in further trust for the disposition of coals, &c., among poor persons of the parish. *Held*, on general demurrer to a declaration, that an action lay upon such covenant, no impossibility of performance appearing, inasmuch as the investment might at any rate be lawfully made in the corporate names of the present archdeacon, vicar, and churchwardens. And *Littledale, J.*, said, in giving judgment:—"The defendants allege that they cannot invest this stock, because the parties named in the bequest are not corporations for that purpose, and the investment could not be effected at the bank. But the answer is, let them show that they have applied at the bank and to the proper officers, and that it is impossible to make the investment with their consent. I should say then that no sufficient answer was given, the law not forbidding the thing to be done, and there being no breach of moral duty involved in it, and the defendants being under covenant to perform it. But, if an actual impossibility were shown, the parties might go to a court of equity to restrain proceedings in an action on the covenant, they showing that they had done all in their power to fulfil it. The testator in this case must be taken to have known, when he covenanted, whether

appears to be, that if a party binds himself to such an undertaking, he may either procure the thing to be done by those who can do it, or else pay damages for the not doing it. The party receiving such a promise may know that the promisor himself cannot do the thing he undertakes, but may not know that he has not already made, or has it not in his power to make, such arrangement with him who can do it as will secure its being done. He has a right, therefore, to expect that it will be done, and to pay for such promise or undertaking, either by his own promise or otherwise. But if the thing undertaken is in its own nature and obviously impossible, he cannot expect it will be done; and to enter into any transaction based upon such undertaking is a fraud or a folly which the law will not sanction. Hence, it would seem *that an engagement by one, entered into with a second party, that a third party shall do something which the first cannot do, is a good consideration for a promise by the second party. (g) The cases which seem to oppose this rule are, generally at least, cases in which the consideration was open to the objection of illegality. (h)

By Code Nap. B. 3, tit. 3, ch. 4, s. 1, it appears that while a promise to do an impossible thing is null, a promise *not* to do an impossible thing is a sufficient foundation for an obli-

the law would permit a fulfilment of the covenant or not; or, perhaps it should rather be said, whether the course of practice would or would not allow it to be carried into effect."—So it will be no excuse for the non-performance of an agreement to deliver goods of a certain quantity or quality, that they could not be obtained at the particular season when the contract was to be executed. *Gilpins v. Consequa*, 1 Pet. C. C. 91; *Youqua v. Nixon*, 1 Pet. C. C. 221.

(g) Thus a promise to procure the consent of a landlord to the assignment of a lease, is binding. *Lloyd v. Crispe*, 5 Taunt. 249. And where one of several partners in a *firm* agreed to introduce the plaintiff (a stranger) into it, it was decided that the agreement was valid, although the other partners were ignorant of its existence, and their assent was of course essential to the admission of the

plaintiff. *McNeill v. Reed*, 2 Moore & S. 89, s. c. 9 Bing. 68.

(h) Thus in *Harvey v. Gibbons*, 2 Lev. 161, which was a writ of error on a judgment in Shrewsbury court, where the plaintiff declared that he being bailiff to J. S., the defendant, in consideration that he would discharge him of £20 due to J. S., promised to expend £40 in repairing a barge of the plaintiff's;—verdict and judgment for the plaintiff, upon *non assumpsit*, were reversed, the consideration being *illegal*, for the plaintiff cannot discharge a debt due to his master. Although this decision is sometimes cited as showing that a contract is void if the consideration is impossible, yet it may be rested more properly on the ground that the consideration was illegal. The same may be said of *Nerot v. Wallace*, 3 T. R. 17, *supra*, u. (b.)

gation which rests upon it. We have no such distinction in the common law.

SECTION XIV.

FAILURE OF CONSIDERATION.

Where the consideration appears to be valuable and sufficient, but turns out to be wholly false or a mere nullity, or where it may have been actually good, but before any part of the contract has been performed by either party, and before any benefit has been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, there a promise resting on this consideration is no longer obligatory, and the party paying or depositing money upon it can recover it back. (*i*) But where the consideration fails only in *part*, principles analogous to those which govern an inquiry into the adequacy of a consideration would be applied to it. If there were a substantial consideration left, although much diminished, it would still suffice to sustain the contract. But if the diminution or failure were such as in effect and reality to take away all the value of the consideration, it would be regarded as one that had wholly failed. But if the consideration, and the agreement founded upon it, both consisted of several parts, and a part of the consideration failed, and the appropriate part of the agreement could be apportioned to it, then they might be treated as several contracts, and a recovery of money paid be had accordingly. (*j*) It is often difficult to say whether a con-

(*i*) *Woodward v. Cowing*, 13 Mass. 216; *Moses v. Macferlan*, 2 Burr. 1012; *Spring v. Coffin*, 10 Mass. 34; *Lacoste v. Flotard*, 1 Rep. Const. Ct. 467; *Wharton v. O'Hara*, 2 N. & McCord, 65; *Pettibone v. Roberts*, 2 Root, 253; *Boyd v. Anderson*, 1 Overton, 438; *Murray v. Carret*, 3 Call, 373; *Treat v. Orono*, 26 Maine, 217; *Sanford v. Dodd*, 2 Day, 437; *Colville v. Besley*, 2 Denio, 139. The failure of consideration must be *total*. *Charlton v. Lay*, 5 Humph. 496; *Dean v. Mason*, 4 Conn. 428. The measure of damages

in such a case is the sum paid; no allowance is to be made for the plaintiff's loss and disappointment. *Neel v. Deens*, 1 N. & McCord, 210.

(*j*) *Franklin v. Miller*, 4 Ad. & El. 605, *Littledale, J.* In this case the declaration stated that defendant, being indebted to certain persons, agreed to repay the plaintiff the amount of all accounts which he should settle for defendant; and also to pay plaintiff £40 a quarter on stated days, till the said debts should be fully settled; and plaintiff agreed to advance to defendant

sideration is divisible and capable of apportionment, or so entire that it must stand or fall together. (*k*) Perhaps no

£1 per week, and certain other sums, out of the sums of £40; that, in consideration of plaintiff's promise, defendant agreed to perform the contract on his part; that plaintiff paid debts for defendant to divers persons, (naming them,) to the amount of £281; that the whole amount of debts was not yet settled; and that several sums of £40 had become due from defendant under the agreement, which had been paid to the amount of £160 only, but the rest were unpaid. Plea, as to two of the sums of £40, that, before they became due, plaintiff had omitted to pay certain of the debts due to creditors of defendant, (naming them,) other than the creditors named in the declaration, which he might have paid; and had also omitted, after the last payment of £40, to pay defendant £1 per week; wherefore defendant in a reasonable time, and before the two sums in question were due, rescinded the contract. Replication, that, before and at the time of the last payment of £40, defendant was indebted to plaintiff in the sum of £50 and more, in respect of the moneys paid by plaintiff for defendant as in the first count mentioned; and that the said £40 was insufficient to discharge the amount in which defendant was so indebted to plaintiff, and for which the agreement was a security. *Held*, that the plea was bad, as showing, at most, only a partial failure of performance by the plaintiff, which did not authorize the defendant to rescind the contract.—So in *Ritchie v. Atkinson*, 10 East, 295, where the master and the freighter of a vessel of 400 tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c., one half to be paid on right delivery, the other at three months; *held* that the delivery of a *complete* cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery.—Likewise in *Roberts v.*

Havelock, 3 B. & Ad. 404, a ship outward bound with goods, being damaged at sea, put into a harbor to receive some repairs which had become necessary for the continuance of the voyage, and a shipwright was engaged, and undertook to put her into thorough repair. Before this was completed he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing. *Held*, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage, at the time when the action was brought.

(*k*) Thus in *Adlard v. Booth*, 7 C. & P. 108, it was *held*, that where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire break out and consume the premises before the whole number have been worked off, the printer cannot recover any thing, although a part have actually been delivered. While in *Cutler v. Close*, 5 C. & P. 337, where a party contracted to supply and erect a warm air apparatus, for a certain sum, it was *held*, in an action for the price, (the defence to which was, that the apparatus did not answer,) that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. This question frequently arises on special contracts to do certain work, according to certain plans, or certain specifications, and the contract is not strictly complied with. Here is a partial failure of consideration, and the plaintiff, in seeking to recover for the labor and materials expended, will be compelled to deduct for his partial failure, and the defendant may rely upon this in reduction of damages, and is not driven to his cross action. *Chapel v. Hickes*, 2 C. & M. 214. And in such case the plaintiff is not entitled to the actual value of the work, *per se*, but only the agreed price *minus* such a sum as would complete the work according

better rule can be given, than that if the thing to be done be in its own nature separable and divisible, and there be no express stipulation or necessary implication which makes it absolutely one thing, and that part which fails may be regarded, to use the language of the court in one case, "not as a condition going to the *essence* of the contract," (*l*) in *such case the failure does not destroy the rights growing out of the performance of the residue. But the other party may have his claim or action for damages arising from such failure. (*m*)

to the contract. *Thornton v. Place*, 1 M. & R. 218. In the case of *Ellis v. Hamlin*, 3 Taunt. 53, it was *held* that if a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover, upon a *quantum valebant*, for the work, labor, and materials.

(*l*) *Lucas v. Godwin*, 3 Bing. N. C. 746, *Bosanquet, J.* In that case, the plaintiff contracted to build cottages by the 10th of October; they were not finished till the 15th. Defendant having accepted the cottages, it was *held* that plaintiff might recover the value of his work, on a declaration for work and labor and materials.—The former practice of compelling a party to pay the full sum for specified labor, and then driving him to his cross action if the work was not done according to contract, was alluded to by *Parke, B.*, in *Mondel v. Steel*, 8 M. & W. 870. In that case it was *held*, after mature consideration, that in all actions for goods sold and delivered with a warranty, or for work and labor, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more. See also *Chapel v. Hickes*, 2 C. & M. 214. So in *Allen v. Cameron*, 3 Tyrwh. 907, where the plaintiff contracted to sell and plant trees on the defendant's land, and also to keep them

in order for two years next after the planting, it was *held*, that evidence of non-performance by the plaintiff of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in an action on the agreement for their price, and for planting them.—Lord *Ellenborough* seems to have laid down the just rule on this subject, in *Farnsworth v. Garrard*, 1 Camp. 38. It was there *held*, that where the plaintiff declares on a *quantum meruit* for work and labor done and materials found, the defendant may reduce the damages, by showing that the work was improperly done; and may entitle himself to a verdict by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.

(*m*) Although it was formerly *held* that the only remedy was by cross action, *Tye v. Gwynne*, 2 Camp. 346; *Moggridge v. Jones*, 3 Camp. 38, yet the party may now resort to the cross action or not, at his election. This subject was examined with much ability and at great length by *Dewey, J.*, in *Harrington v. Stratton*, 22 Pick. 510, where it was *held* that in an action by the payee against the maker of a promissory note given for the price of a chattel, it is competent for the maker to prove, in *reduction* of damages, that the sale was effected by means of false representations of the value of the chattel, on the part of the payee, although the chattel has not been returned or tendered to him. And the learned judge in the course of his opinion, said:—"The strong argument for the admission of such evidence in reduction of damages in cases like the present is,

SECTION XV.

RIGHTS OF A STRANGER TO THE CONSIDERATION.

In some cases, in which the consideration did not pass directly from a plaintiff, and the promise was not made directly to him, it has been made a question how far he * might avail himself of it, and bring an action in his own name, instead of the name of the party from whom the consideration moved, and to whom the promise was made. It seems to have been anciently held (*n*) as a rule of law, (though not universally so,) (*o*) that no stranger to the consideration of an agreement could have an action on such agreement, although it were made expressly for his benefit; and this rule has been recognized and enforced in modern times. (*p*) But it is certain that if the actual promisee is merely the agent of the party to be benefited, that party may sue upon

that it will avoid circuity of action. It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit; and it is upon this ground that the courts have of late been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle of allowing evidence in defence or in reduction of damages, to be introduced, rather than to compel the defendant to resort to his cross action. As it seems to us, the same purpose will be further advanced, and with no additional evils, by adopting a rule on this subject equally broad in its application to cases of actions on promissory notes, between the original parties to the same, as to actions on the original contract of sale, and holding that, in either case, evidence of false representations as to the quality or character of the article sold, may be given in evidence to reduce the damages, although the article has not been returned to the vendor."—See also *Mixer v. Coburn*, 11 Met. 559; *Perley v. Balch*, 23 Pick. 286; *Hammat v. Emerson*, 27 Maine, 308; *Coburn v. Ware*, 30 Maine, 202; *Spalding v. Vandercook*, 2 Wend. 431. The cases of *Scudder v. Andrews*, 2

McLean, 464; *Pulsifer v. Hotchkiss*, 12 Conn. 234, and some others seem, however, not in accordance with this principle.

(*n*) *Crow v. Rogers*, 1 Str. 592; *Bourne v. Mason*, 1 Vent. 6, 2 Keb. 457; *Bull. N. P.* 134. And in the late case of *Jones v. Robinson*, 1 Exch. 456, *Parke, B.*, says:—"It is true that no stranger to the consideration can sue."

(*o*) *Dutton v. Poole*, 1 Vent. 318, 332, *T. Jones*, 103, 2 Lev. 210.

(*p*) *Price v. Easton*, 4 B. & Ad. 433, 1 Nev. & Mann. 303. In this case the declaration stated that W. P. owed the plaintiff £13, and that in consideration thereof, and that W. P., at the defendant's request, had promised defendant to work for him at certain wages, and also, in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the said sum of £13. Averment, that W. P. performed his part of the agreement. Judgment arrested, because the plaintiff was a stranger to the consideration. And *Littledale, J.*, said:—"This case is precisely like *Crow v. Rogers*, and must be governed by it."

the promise, whether his relation to and interest in the agreement were known or not. (q) This, however, rests upon the ground that the consideration actually moves from such party, and that he cannot be regarded as a stranger to it. But it seems to be held in some recent cases that, while the rule itself is not denied, it would generally be held inapplicable where the beneficiary has any concern whatever in the transaction. (r) In some cases, the actual promisee would * be considered only the agent of the beneficiary, and in others the beneficiary would be regarded as the trustee of the party to whom the promise was directly made, and, as such trustee, might maintain an action in his own name. (s) In this country, the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted; (t) and perhaps it would be safe to consider this a prevailing rule with us.

(q) As in the familiar instance of principals suing for goods sold by their factors, who may be supposed perhaps to have been the principals, and to whom alone the promise was made. *Hornby v. Lacy*, 6 M. & S. 166; *Coppin v. Craig*, 7 Taunt. 243; *Morris v. Cleasby*, 1 M. & S. 576.

(r) Thus, in the recent case of *Lilly v. Hays*, 1 Nev. & Perry, 26, 5 Ad. & El. 550, where it was held that if A. remits money to B. to pay C., and B. promises C. to pay it to him, C. can maintain an action against B. for money had and received. And *Patteson, J.*, there said:—"The only question in this case is, whether there is a consideration moving from the plaintiff. It is said that such is the rule of law hitherto adhered to; and to that I agree. But in an action for money had and received there seldom is a direct consideration moving from the plaintiff. Suppose the case of money sent to a general agent, who had promised to pay over the money sent to him,—in an action against him by the person for whose use this money was sent, would it be any answer for him to say, that the consideration did not move from the plaintiff? Again,—Suppose money is sent to a banker for the payment of certain debts,—does not the consideration indirectly move from the creditor whose particular debt is to be paid by the debtor's sending the money?

The debtor may be considered as the agent of the creditor, and the money paid indirectly to the banker by the latter. So here, the defendant, though not the general agent, became the agent of Wood, in this transaction; therefore the consideration did move from the plaintiff, through the instrumentality of Wood."—See also *Jones v. Robinson*, 1 Exch. 454; *Thomas v. Thomas*, 2 Q. B. 851; *Hinkley v. Fowler*, 15 Maine, 285; *Carnegie v. Morrison*, 2 Met. 401.

(s) In *Pigott v. Thompson*, 3 B. & P. 149, Lord *Alvanley* is reported to have said:—"It is not necessary to discuss whether if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently on this point. It appears to me that C. would be only a trustee for A., who might for some reason be desirous that the money should be paid into the hands of C. In case of marriage, it is often necessary to make contracts in this manner, and the personal action is given to the trustees for the benefit of the feme covert."

(t) See 22 Am. Jur. 16-20; *Hind v. Holdship*, 2 Watts, 104; *Arnold v. Ly-*

But where the promise is made under seal, and the action must be debt or covenant, then it must be brought in the name of the party to the instrument, and a third party for whose benefit the promise is made cannot sue upon it. (*u*)

SECTION XVI.

THE TIME OF THE CONSIDERATION.

Considerations may be of the past, of the present, or of the future. When the consideration and the promise founded * upon it are simultaneous, then the consideration is of the present time; the whole agreement is completed at once, and the consideration and the promise are concurrent. When the consideration is to do a thing hereafter, it is said to be executory; when the promise to do this is accepted, and a promise in return founded upon it, this latter promise rests on a sufficient foundation, and is obligatory. When the consideration is wholly past, it is said to be executed; and in relation to considerations of this kind many nice questions have arisen.

It may be stated, as the general rule, that a past or executed consideration is not sufficient to sustain a promise founded upon it, unless there was a request for the consideration previous to its being done or made. This request should be alleged in a declaration which sets forth an executed consideration as that on which is founded the promise that is sought to be enforced. Without such previous request a subsequent promise has no force; because the con-

man, 17 Mass. 400; *Bridge v. Niagara Ins. Co.* 1 Hall, 247; *Jackson v. Mayo*, 11 Mass. 152, n. *a*; *Hinkley v. Fowler*, 15 Maine, 285; *Hall v. Marston*, 17 Mass. 575; *Felton v. Dickinson*, 10 Mass. 287. This question was fully examined in the late case of *Carnegie v. Morrison*, 2 Met. 381, by *Shaw, C. J.*, the old case of *Dutton v. Poole*, 1 Vent. 318, being adopted as good law, and in *Brewer v. Dyer*, 7 Cush. 337, the same doctrine is reaffirmed.—In like manner the American courts have held that a

promise to three, upon a consideration moving from them and a fourth person, will support an action by the three. *Cabot v. Haskins*, 3 Pick. 83. See also *Farrow v. Turner*, 2 A. K. Marsh. 496; *Crocker v. Higgins*, 7 Conn. 347; *Miller v. Drake*, 1 Caines, 45. See also *Bigelow v. Davis*, 16 Barb. 561.

(*u*) *Lord Southampton v. Brown*, 6 B. & C. 718; *Offly v. Ward*, 1 Lev. 235; *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Hinkley v. Fowler*, 15 Maine, 285.

sideration being entirely completed and exhausted, it cannot be considered that it would not have been made or given, but for a promise which is subsequent and independent. A familiar illustration is afforded by the case of a guarantor. If one lends money to another, and at a subsequent time a third party, who did not request the loan, and is not benefited by it, promises to see that it is repaid, such promise is void, because no consideration passes from the promisee to the promisor. But if the promisor requests the loan, or if his promise is made previous to the loan, or at the same time, then it will be supposed that the loan is made because of the promise. It will also be supposed that the promisor is benefited by the loan because he requests it, or, at least, that the lender parts with his money in consequence of the promise, and this is a detriment to him, which is equally good by way of a consideration.

But this previous request need not always be express, or proved, because it is often implied. As, in the first place, where one accepts or retains the beneficial result of such voluntary service. Here, the law generally implies both a previous request and a subsequent promise of repayment. * No one can compel another to accept a gratuitous and unrequested service; no one can make himself the creditor of another, without his consent, or against his will. But if that other chooses to accept such service, or the service being rendered voluntarily, retains all the benefit thereof to himself, this puts the service on the same footing, in the law, as one rendered at request, and for which a promise is made. The cases where goods are supplied to an infant, and the father is held responsible, often fall within this rule. (v)

(v) Thus in *Law v. Wilkin*, 6 Ad. & El. 718, which was an action against a father for goods supplied his minor son, who was away at school. The only evidence to charge the father was, that the boy, when he went home for the holidays, took the clothes with him, but was not wearing them; and that he returned to school with them. *Coleridge, J.*, said:—"The defendant's son was sent to school in want of clothes. When they were supplied, and he went home with them, we are not to assume that

he concealed them. My brother *Storks* admits that, if the father had seen them, an implied authority would be shown." So in the *Fishmonger's Co. v. Robertson*, 5 M. & G. 192, *Tindal, C. J.*, said if persons receive a benefit from a contract on which they would not be originally bound, this would bind them, and render them liable for the fulfilment of the contract. *Doe v. Taniere*, 13 Jur. 119. So where one built a school-house under a contract with persons assuming to act as a district committee,

And, in the second place, where one is compelled to do for another what that other should do, and was compellable to do. Here also the law implies not only a previous request that the thing should be done, but also a promise to compensate for the doing of it. (*w*) As where one is surety for another, and pays the debt which the other owes. Here the surety can recover what he pays, without proving that the principal debtor either requested him to pay the money, or promised to repay him; for the law implies all this. In receiving him as surety, or in requesting him to become his

but who had in fact no authority, yet a district school was afterwards kept in it by direction of the authorized school agent, this was *held* to be an acceptance of the house by the district, and they were held liable to pay the reasonable value of the building. *Abbot v. Hermon*, 7 Greenl. (Bennett's Ed.) 118, and note. See also *Roberts v. Morston*, 20 Maine, 275; *Hayden v. Madison*, 7 Greenl. 76; *Weston v. Davis*, 24 Maine, 374; *Hatch v. Purcell*, 1 Foster, 544; *Newell v. Hill*, 2 Mete. 180. So if a conveyance of an interest in land be made in the common form of a quit-claim deed, containing this stipulation, — "provided said grantee shall pay said grantor or his assigns, twenty-two dollars annually from this date on demand" — until the happening of a certain event; and the grantee holds under the deed, but fails to make the annual payments when demanded; the grantor may sustain an action of assumpsit against the grantee, to recover the money. *Huff v. Nickerson*, 27 Maine, 106. — But if one build a house for his own convenience on the land of another, by his permission, there is no implied agreement on the part of the owner of the land to pay the value of such house. *Wells v. Banister*, 4 Mass. 514. Neither can a school district be held liable for unauthorized repairs upon their school-house, from the fact that they afterwards used the house; for this acceptance and holding of the repairs cannot be considered as voluntary, because the house could not well be used without making use of the repairs. *Davis v. Bradford*, 24 Maine, 349. — So the law will not imply a promise on the part of a pauper to pay from his estate moneys expended by the town of his settlement for his support. *Charlestown v. Hubbard*, 9

New Hamp. 195; *Deer Isle v. Eaton*, 12 Mass. 328.

(*w*) *Jefferys v. Gurr*, 2 B. & Ad. 833; *Pownal v. Ferrand*, 6 B. & C. 439. In this case the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill; and it was *held* that he might recover the same from the acceptor in an action for money paid to his use. And *Bayley, J.*, said: — "The law is that a party, by voluntarily paying the debt of another, does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay, to reimburse me. That principle was fully established in the case of *Exall v. Partridge*, 8 T. R. 308." — *Grissell v. Robinson*, 3 Bing. N. C. 10. In this case the plaintiffs, having agreed with the defendant to give him a lease of certain premises, caused their attorney to prepare the lease, and paid him for it; and afterwards brought their action against the defendant to recover the amount so paid, and declared in assumpsit for money paid by them for the defendant's use. It was *held* that they were entitled to recover, the evidence showing that it was the custom for the landlord's attorney to draw the lease, and for the lessee to pay for it. *Park, J.*, said: — "As the plaintiffs were liable to their own attorney in the first instance, and all the evidence shows that, according to the custom, the defendant is ultimately bound to pay for the lease, he must be taken to have impliedly assented to the payment made by the plaintiffs, and the action lies for money paid to his use." See also *Davies v. Humphreys*, 6 M. & W. 153.

surety, he will be considered as having requested him to pay the debt; and if such request to pay the debt were express, the general principles of law would imply the promise of repayment. The compulsion in this case must be a legal one; or, in other words, there must be an obligation which the law will enforce. (x)

*And, in the third place, where one does voluntarily, and without request, that which he is not compellable to do, for another who is compellable to do it. As if one who is not surety, nor bound in any way, pays a debt due from another. He has not the same claim and right as if he had been compellable to pay this debt. For now the law, if there be a subsequent promise to repay the money, will indeed imply the previous request, as, if there had been a previous request, it would have implied a subsequent promise; but it will not imply both the promise and the request, as in the former case. (y) The reason is, that the debtor shall not

(x) *Pitt v. Purssord*, 8 M. & W. 538. In this case one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, on the note becoming due, paid the amount, though no demand had been made or action brought against him by the holder. It was *held* that such payment could not be considered voluntary, and that he might sue his cosurety for contribution. And *Alderson, B.*, said:—"This is not a voluntary payment, nor is it like the case where one is liable as principal and another as surety. Here the sureties are not liable in default of the principal; they are all primarily liable, and are all equally so. This was not a payment made voluntarily, but was a payment in discharge of a debt due on an instrument on which the defendant was liable."

(y) *Wing v. Mill*, 1 B. & Ald. 104. In this case a pauper, residing in the parish of A., received, during illness, a weekly allowance from the parish of B., where he was settled. *Held*, that an apothecary, who had attended the pauper, might maintain an action for the amount of his bill against the overseer of B., who expressly promised to pay the same.—But without such express promise, such action, it seems, could not be maintained. *Paynter v. Williams*, 1 Cr. & M. 819. In this case a

pauper, whose settlement was in the parish of A., resided in the parish of B., and whilst there received relief from the parish of A., which relief was afterwards discontinued, the overseers objecting to pay any more unless the pauper moved into his own parish. The pauper was subsequently taken ill and attended by an apothecary, who, after attending him nine weeks, sent a letter to the overseers of A., upon the receipt of which they directed the allowance to be renewed, and it was continued to the time of the pauper's decease. *Held*, that the overseers of A. were liable to pay so much of the apothecary's bill as was incurred after the letter was received. And *Bayley, B.*, said:—"I am of opinion that the parish is liable, and that the plaintiff can maintain the present action. The legal liability is not alone sufficient to enable the party to maintain the action, without a retainer or adoption of the plaintiff on the part of the parish. The legal liability of the parish does not give any one who chooses to attend a pauper and supply him with medicines a right to call on them for payment. It is their duty to see that a proper person is employed, and they are to have an option who the medical man shall be. *Wing v. Mill* does not go the length of saying that a mere legal liability is enough; there must be a re-

be obliged to accept another party as his creditor without his consent. He owes some one; and he may have partial defences, or other reasons for wishing to arrange the debt with him and not another; and if another comes in without request or necessity and pays the debt, the debtor is not obliged to substitute him in the place of his original creditor *unless he chooses to do it. But he may do this if he so wishes; and if, after the debt is paid by this third party, the debtor choose to promise him repayment, he is held to such promise, and the consideration, although executed, is sufficient, for the law implies a previous request; or, what is the same thing, will not permit the debtor to deny the allegation of such request in the declaration.

It is, however, to be observed, that where the law implies both the previous request and also a subsequent promise, there no other promise than that which is so implied can be enforced, if the consideration for the promise be an executed one. (z) In other words, no express promise made after a

tainer or adoption. In that case the parish officers were aware of the attendance, and sanctioned it, because they applied to him to send in his bill." See further, *Doty v. Wilson*, 14 Johns. 378; *Gleason v. Dyke*, 22 Pick. 393; *Dearborn v. Bowman*, 3 Metc. 155.

(z) *Kaye v. Dutton*, 7 M. & G. 807. This was an action of assumpsit upon an agreement, whereby, after reciting that one W. in his lifetime mortgaged certain premises to R. & B. to secure £3,500; that R. and B. required W. to procure the plaintiff to join him in a bond, as a collateral security for that sum and interest; that the defendant had, since the death of W., taken upon himself the management of the estate of W., and had paid to R. and B. £3,370; that the plaintiff had been called upon as surety, and had paid to R. and B. £130; that the defendant had repaid him £48, leaving £82 due; that the defendant had agreed to repay the plaintiff the £82 out of the moneys which might arise from the sale of the mortgaged premises, and in the mean time to appropriate the rents towards payment of the same, as the plaintiff had a lien upon the premises for the same; that the defendant had requested the plaintiff to release and convey all his

estate and interest in the premises to A. and L., and that *that he had already done, reserving to himself a lien on the said property*, — it was witnessed that, in consideration of the plaintiff's having paid the £130 to R. & B. in part discharge of the mortgage, and in consideration of his having released and conveyed all his estate and interest in the premises to A. & L., and in order to secure to the plaintiff the repayment of the £82, the defendant undertook and agreed with the plaintiff to pay him the same, with interest, out of the proceeds of the premises when sold, and, in the mean time, to appropriate the rents in liquidation of the same. The declaration then stated that, in consideration of the premises, the defendant promised the plaintiff to perform the agreement; and alleged for breach, that, although the defendant had received rents to a sufficient amount, he had failed to pay. *Held*, that, inasmuch as the declaration did not show that the plaintiff had any interest in the premises, except that which he reserved, his release and conveyance, though executed at the defendant's request, formed no legal consideration for the promise alleged to have been made by the latter. And *Tindal, C. J.*, in that case said: — "Two objec-

consideration has been wholly executed, and founded wholly upon that consideration, can be enforced, if it differs from the promise which the law implies. Otherwise, there would be two distinct and perhaps antagonistic promises resting upon one consideration. From what has been said it will be seen that, where the consideration is wholly executed, the law implies in some cases a previous request, provided a promise be proved; but will not imply a request and thence imply a promise. On the other hand, wherever the law implies the

tions were made to the declaration — first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz., *Brown v. Crump*, 1 Marsh. 567, 6 Taunt. 300; *Granger v. Collins*, 6 M. & W. 458; *Hopkins v. Logan*, 5 M. & W. 241; *Jackson v. Cobbin*, 8 M. & W. 790; and *Roscorla v. Thomas*, 3 Q. B. 234, 2 Gale & D. 508, certainly support that proposition to this extent, — that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged is a sufficient consideration to render binding a promise afterwards made by him in re-

spect of the act so done. *Hunt v. Bate*, and several cases mentioned in the margin of the report of that case, seem to go to that extent; as also do some others collected in Rolfe, Abr. *Action sur Case*, (Q.) — So in *Jackson v. Cobbin*, 8 M. & W. 790, a declaration in assumpsit stated, in substance, that the defendant agreed to let, and the plaintiff to take, a certain messuage and premises on certain specified terms, and that afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff, without restriction as to the purpose for which the same should be used and occupied. Held, on special demurrer, that such a promise could not be implied from the relation of the parties, and that the consideration alleged was insufficient to sustain it. See also *Hopkins v. Logan*, 5 M. & W. 241; *Lattimore v. Garrard*, 1 Exch. 809. In *Roscorla v. Thomas*, 3 Q. B. 235, the declaration stated that, in consideration that plaintiff, at the request of defendant, had bought a horse of defendant at a certain price, defendant promised that the horse was free from vice; but it was vicious. Held bad, on motion in arrest of judgment; for that the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such promise, assuming it (as must be assumed on motion in arrest of judgment,) to be express. But we think this case goes too far, in saying a consideration which would not raise an implied promise would not sustain an express one. See the observations

promise, there it will also imply a request; and hence it may be said that express request is unnecessary where the law implies a promise. (a)

of *Tindal, C. J.*, in *Kaye v. Dutton*, cited above.

(a) It follows from what is stated in the text that in declaring on an executed consideration, it is not necessary to allege a precedent request where the law will imply a promise without a request. See *Osborne v. Rogers*, 1 Wms. Saund. 264, n. 1, as corrected by the learned note of Mr. Sergeant Manning, appended to the case of *Fisher v. Pync*, 1 Man. & Gr. 265. Accordingly, in *Victors v. Davies*, 12 M. & W. 758, it was held that in a declaration for money lent, it is not necessary to aver that the money was lent at the defendant's request. *Parke, B.* "There is a very learned note of my brother Manning on this subject, in which he goes into the whole law with respect to alleging a request, and points out the error into which Mr. Sergeant Williams appears to have fallen in his comment upon *Osborne v. Rogers*. The note is thus: 'The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking, appears to have been unnecessary. In *Osborne v. Rogers* the consideration of a promise is laid to be, that the said Robert, at the special instance and request of the said William, would serve the said William, and bestow his care and labor in and about the business of the said William; and the declaration alleges, that Robert, confiding in the said promise of William, afterwards went into the service of William, and bestowed his care and labor in and about,' &c. Here the consideration is clearly executory, yet Mr. Sergeant Williams, in a note to the words 'at the special instance and request,' says, 'these words are necessary

to be laid in the declaration, in order to support the action. It is held, that a consideration executed and past,—as, in the present case, the service performed by the plaintiff for the testator in his lifetime, for several years then past,—is not sufficient to maintain an assumpsit, unless it was moved by a precedent request, and so laid.' The statement, according to modern practice, of the accrual of a debt for, or the making of a promise for the payment of, the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant, at his request, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*. It being immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made, and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. Vide Rastall's Entries, tit. 'Dette;' and Co. Ent. tit. 'Debt.' There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid; because no man can be a debtor for money paid, unless it was paid at his request. What my brother Manning says, in the note to which I have referred, is perfectly correct."

CHAPTER II.

ASSENT OF THE PARTIES.

Sect. I.—*What the Assent must be.*

THERE is no contract, unless the parties thereto assent; and they must assent to the same thing, in the same sense. (b) A mere assent does not suffice to constitute a contract, for there may be an assent in a matter of opinion, or in some fact which is done and completed at the time, and therefore leaves no obligation behind it. But a contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual. This is sometimes briefly expressed, by saying that there must be “a request on the one side and an assent on the other.” (c) A mere affirmation, or proposition, is not enough. Nor is this any more a contract if it be in writing than if spoken only. (d) It becomes a contract only when

(b) *Hazard v. New England Marine Ins. Co.* 1 Sumner, 218. In *Bruce v. Pearson*, 3 Johns. 534, it was *held* that if a person sends an order to a merchant to send him a particular quantity of goods on certain terms of credit, and the merchant sends a less quantity of goods, at a shorter credit; and the goods sent are lost by the way, the merchant must bear the loss, for there is no contract, express or implied, between the parties. So where shingles were sold and delivered at \$3.25, but there was a dispute as to whether the \$3.25 was for a bunch or for a thousand; it was *held*, that, unless both parties had understandingly assented to one of those views, there was no special contract as to the price. *Greene v. Bateman*, 2 W. & M. 359. See further *Tuttle v. Love*, 7 Johns. 470; *Eliason v. Henshaw*, 4

Wheat. 225; *Falls v. Gaither*, 9 Porter, 605; *Hutchison v. Bowker*, 5 M. & W. 535; *Hamilton v. Terry*, 10 E. L. & E. 473.

(c) *Tindal*, C. J., in *Jackson v. Galloway*, 5 Bing. N. C. 75.

(d) *Tucker v. Woods*, 12 Johns. 190. See also *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 Johns. 470; *Weeks v. Tybald*, Noy, R. 11; 1 Rol. Abr. 6, (M,) pl. 1.—To render a proposed contract binding, there must be an accession to its terms by both parties,—a mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it. *Johnston v. Fessler*, 7 Watts, 48; *Ball v. Newton*, 7 Cush. 599.—In *Eskridge v. Glover*, 5 Stewart & Porter, 264, it was *held*

the proposition is met by an acceptance which corresponds with it entirely and adequately.

Many cases turn upon the question whether this assent to the proposition was entire and adequate. The principle may be stated thus. The assent must comprehend the whole of the proposition, it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter. Thus, an offer to sell a certain thing, on certain terms, may be met by the answer, "I will take that thing on those terms," or by any answer which means this, however it may be expressed; and, if the proposition be in the form of a question, as, "I will sell you so and so, will you buy?" the whole of this meaning may be conveyed by the word "Yes," or any other simply affirmative answer. And thus a legal contract is completed.

But there are cases where the answer, either in words or in effect, departs from the proposition; or varies the terms of the offer; or substitutes for the contract tendered, one more satisfactory to the respondent. In these cases there is no assent, and no contract. The respondent is at liberty to accept wholly or to reject wholly; but one of these things he must do; for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer. The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected again reply, accepting generally, and upon this acceptance claim the right of holding the other party to his first offer.

An answer or a compliance has been sometimes held insufficient to make a contract, where the difference of terms between the parties did not seem to be very important. (*e*)

that an *incomplete* contract or agreement, which one of the parties has the option of completing at a particular day, raises a mutual right of rescission, in the other party, at any time before the ratification by the first. Thus, where A. proposed to exchange horses with B., and give B. a specific amount, as difference, which proposition B. reserved the privilege of determining

upon, by a certain day; and before that day arrived A. gave notice to B. that he would not confirm the offered contract, it was *held* that no action lay in favor of B. to recover the difference agreed to be paid by A. See also *Cope v. Albinson*, 16 E. L. & E. 470.

(*e*) Thus in *Hutchison v. Bowker*, 5 M. & W. 535, the action was *assumpsit* for the non-delivery of barley. It was

In fact the court seldom inquires into the magnitude or effect of this diversity; if it clearly exists, that fact is enough. But it is not material by which of the parties to an agreement the words which make it one are spoken; the intent governs, and if this be clear, and expressed with sufficient definitiveness, it is enough. (f)

This question frequently occurs in cases where a guaranty was offered, and the party receiving it acted on the faith of such guaranty. But this is not enough, without a previous

proved at the trial that the defendants wrote to the plaintiffs, offering them a certain quantity of "good" barley, upon certain terms; to which the plaintiffs answered, after quoting the defendant's letter, as follows:—"Of which offer we accept, expecting you will give us *fine* barley and full weight." The defendants, in reply, stated that their letter contained no such expression as *fine* barley, and declined to ship the same. Evidence was given at the trial that the terms "good" and "fine" were terms well known in the trade; and the jury found that there was a distinction in the trade between "good" and "fine" barley. *Held*, that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that, they having found what that meaning was, it was for the court to determine the meaning of the contract; and the court held that there was not a sufficient acceptance. See also *Slaymaker v. Irwin*, 4 Whart. 369. So where there is a material variance between the bought and sold notes delivered by a broker to the vendor and vendee, there is no sale. *Peltier v. Collins*, 3 Wend. 459; *Suydam v. Clark*, 2 Sandf. 133. See the late case of *Sivewright v. Archibald*, 6 E. L. & E. 286. So in *Jordan v. Norton*, 4 M. & W. 155, which was assumpsit for a mare sold and delivered, to which the defendant pleaded non-assumpsit. It appeared that the defendant, having seen and ridden the mare, wrote to the plaintiff, "I will take the mare at twenty guineas, *of course warranted*; and as she lays out, turn her out my mare." The plaintiff agreed to sell her for twenty guineas. The defendant subsequently wrote again to him, "My son will be at the World's End (a public house,) on Monday, when he will take the mare and pay you;

send anybody with a receipt, and the money shall be paid; only say in the receipt, *sound, and quiet in harness*." The plaintiff wrote in reply, "She is warranted sound, and quiet in *double harness*; I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days, and then returned her as being unsound. The learned judge stated to the jury that the question was whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had not authority to take her away. *Held*, on motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that, therefore, the direction of the learned judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent; and consequently that the plaintiff was not entitled to recover.

(f) *Putnam, J.*, in *Hubbard v. Coolidge*, 1 Met. 93. But where a conversation is relied upon as proof of an agreement, it is for the jury to decide whether such an assent of the minds of the parties took place as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement. *Thruston v. Thornton*, 1 Cush. 89.

acceptance of the guaranty. (g) Nor does this rest on a merely technical rule. Justice to the guarantor obviously requires that he should have notice of an intention to furnish goods or money, or do any similar thing on the credit of his guaranty. And this notice must be distinct, so that there can be no mistake about it, and given in good season, so that the guarantor may, if he chooses, take proper measures to secure himself. Such a case must, however, be discriminated from one of absolute and completed guaranty; as where one writes, "I hereby guarantee you, &c," and delivers the paper. This is not an offer, or proposition to guarantee, but a declaration of the fact, and if made on good consideration binds the party, without further action on the part of him who receives it. (h) But where the guaranty

(g) Thus in *Gaunt v. Hill*, 1 Starkie, 10, which was assumpsit for non-payment of £70, in consideration of forbearance. The defendant's brother being indebted to the plaintiff in the sum of £140, the defendant offered by letter to pay the plaintiff £70, provided he would give his brother a full discharge; and directed him, in case he accepted his offer, to call upon him the next morning. *Held*, that the offer was not binding upon the defendant, unless accepted within the time appointed, and that at all events it must be shown that the plaintiff had acceded to the proposal in writing.—So in *McIver v. Richardson*, 1 M. & S. 557, a paper writing was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone,) to this effect:—"I understand A. & Co. have given you an order for rigging, &c. I can assure you, from what I know of A.'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guarantee you against any loss from giving them this credit;" which paper was handed over by A. to the plaintiffs, together with a guaranty from another house, which they required in addition, and the goods were thereupon furnished: *Held*, that the paper did not amount to a guaranty, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guaranty. And on the

authority of that case the Court of Exchequer afterwards, in *Mozley v. Tinkler*, 1 Cr. M. & R. 692, adopted the same doctrine. In that case there was a guaranty in the following form:—"F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as fifty pounds; for my reference apply to B." Signed "G. T." B. wrote this memorandum, and added, "Witness to G. T.—J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guaranty, *held*, that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover. See also *Morrow v. Waltz*, 18 Penn. 118.

(h) The distinction between a mere offer to guarantee, and an *actual* guaranty, is well illustrated by the case of *Jones v. Williams*, 7 M. & W. 493. In that case the defendant's undertaking was contained in two letters, addressed to C. J., the brother of the plaintiff's intestate, R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join, in a security for the repayment of money to be advanced to the defendant for carrying on a suit in chancery; and in the second he again urged that they should lend their names for this purpose, and added:—"I should consider it a matter of favor to myself if your brothers will join, and I will see that they come to no harm." *Held*, that the letters amounted to an

is made only as an offer, or a proposition, there must be a distinct acceptance of it. The subject of guaranty we shall, however, consider specifically hereafter.

At a sale by auction, every bid of any one present is an offer by him. It becomes a contract as soon as the hammer falls, or the bid is otherwise accepted; (*i*) but until it is accepted it may be withdrawn by the bidder, because until then it is not obligatory on him, for want of the assent of the owner of the property by his agent the auctioneer.

SECTION II.

CONTRACTS ON TIME.

Propositions or offers on time involve questions of the assent of parties, which are sometimes difficult. (*j*) Strictly

actual guaranty, on which the defendant was liable to the plaintiff, and not merely to a representation with a view to the parties doing an act, against the consequences of which they should *afterwards* be protected.

(*i*) *Payne v. Cave*, 3 T. R. 148. The court there said:—"The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to."—As sales at auction are clearly within the statute of frauds, *Hinde v. Whitehouse*, 7 East, 568; *Kenworthy v. Schofield*, 2 B. & C. 945; *Brent v. Green*, 6 Leigh, 16, the assent would not be binding unless in writing, if the case came within the terms of that statute.

(*j*) This subject was discussed in the late case of *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224. It was there held, that a proposition in writing to sell land, at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if not being retracted, it is accepted within

the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced by a bill in equity. *Fletcher, J.*, there observed:—"In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked it was a continuing offer during the time limited for acceptance; and during the whole of that time, it was an offer every instant, but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was pre-

speaking, all offers are on time. If one says, I will sell you this thing for this money, and the other answers, I will buy that thing at that price, all authorities agree that this is a contract. But the answer follows the offer; it cannot be actually simultaneous with it, although it is sometimes said to be so. But the offer is regarded as continuing until the acceptance, if the acceptance be made at once. Nor can it be necessary that the acceptance should follow the offer instantaneously. Though the party addressed pauses a minute or two for consideration, still his assent makes a contract, for the offer continues unless it be expressly withdrawn. But how long will it continue? The only answer must be, in general, a reasonable time; (*jj*) and what this is must be determined by the circumstances of the case. If the party addressed goes away, and returns the next month or the next week, and says he will accept the proposition, he is too late unless the proposer assents in his turn. So it would be probably if he came the next day, or the next hour; or perhaps if he went away at all and afterwards returned.

But the proposer may himself determine how long the offer shall continue. He may say, I will give you an hour, or until this time to-morrow, or next week, to make up your mind. Then the party to whom the proposition is made knows how long the offer is to continue. He may avail himself of the hour, the day, or the week given, for inquiry or consideration, or making the necessary arrangements; and if within the prescribed time he expresses his assent, (sup-

cisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once. A different doctrine, however, prevails in France, and Scotland, and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who

has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached. The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports, as well as in the text-books."

(*jj*) *Beckwith v. Cheever*, 1 Foster, 41; *Peru v. Turner*, 1 Fairf. 185.

posing the proposition not in the mean time withdrawn,) he completes the contract as effectually as if he had answered in the same way at the first moment after the offer was made. (*jk*)

It seems irrational to say that the proposer is not bound by receiving such delayed assent, although it is given within the specified time, because no consideration had been paid him for the delay, and for the continuance of the offer. If it were said that where one makes an offer, and the other instantly accepts, the offerer nevertheless is not bound, because there is no consideration, then it might be said consistently that he is not bound by an answer made within a time specified by him. But no one doubts that the offerer is bound by an instantaneous acceptance, although he received no consideration for the offer. And what difference can it make as to the consideration or the want of it, whether the acceptance follows the offer in a second, or in a minute or two, or in a longer, but still reasonable time, or in a still longer time limited and specified by the proposer himself. All these cases stand on the same footing in respect of consideration.

Undoubtedly, if the offerer gives a day for acceptance, without consideration for the delay, he may at any time within that day, before acceptance, recall his offer. So he may if he gives no time. If he makes an offer, and instantly recalls it before acceptance, although the other party was prepared to accept it the next instant, the offer is effectually withdrawn. But acceptance before withdrawal binds the parties, if made while the offer continues; and the offer does continue in all cases, either a reasonable time, (and that only,) or the time fixed by the party himself.

It may be said, that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. If the proposer fixes a time he expresses his intention, and the other party knows precisely what it is. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose that the parties contemplated; and the law

will decide this to be that time which as rational men they ought to have understood each other to have in mind.

We hold this to be the true principle, and to be capable of universal application. Thus where many subscribe for a common result on a certain condition, the first question may be as to the consideration; and this we have already discussed. And it would be another question how long the parties are bound by the promise contained in such subscription. If no time be agreed on, and there be no express withdrawal, then the law must choose between the period of legal presumption, which would generally be twenty years, and the principle of reasonable time; and the first alternative would be very unreasonable, and might be very oppressive. The court would look into all the circumstances of each case, and inquire what the parties actually understood or intended, or, regarding them as rational men, what they must be supposed to have intended. And it seems difficult to reject this rule, without holding principles which would lead to the conclusion that one who offers goods to another, and, receiving no answer, sells them to a third person a year after, may still be held by him to whom the offer was first made, if he shall then see fit to accept the offer; a conclusion so wholly unreasonable as to be impossible.

An analogous and closely connected question has arisen where the proposition and the reply are both made by letter. And as we think, it must be governed by the same principles. We consider that an offer by letter is a continuing offer until the letter be received, and for a reasonable time thereafter, during which the party to whom it is addressed may accept the offer. We hold also that this offer may be withdrawn by the maker at any moment; and that it is withdrawn as soon as a notice of such withdrawal reaches the party to whom the offer is made, and not before. (*k*) If,

(*k*) Notwithstanding the case of *McCulloch v. Eagle Ins. Co.* 1 Pick. 281, we deem the rule of the text to be the well-settled law in England and in this country. It was first laid down in England in *Adams v. Lindsell*, 1 B. & Ald. 681, in 1818. The case of *Cooke v.*

Oxley, 3 T. R. 653, was there relied upon by counsel, but the court said "that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs

therefore, that party accepts the offer before such withdrawal, the bargain is completed; there is then a contract founded upon mutual assent. And an acceptance having this effect is made, when the party receiving the offer puts into the mail his answer accepting it. Thus, if A., in Boston, on the first day of January, writes to B., in Baltimore, making an offer, and this letter reaches Baltimore on the third, and B. forthwith answers the letter, accepting the offer, putting the letter into the mail that day; and on the second of January A. writes withdrawing the offer, and his letter of withdrawal reaches B. on the fourth, there is nevertheless a contract made between the parties. If the offer was to sell goods, B. on

ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.* See also *Kennedy v. Lee*, 3 Meriv. 441. And in the late case of *Potter v. Sanders*, 6 Hare, 1, decided in 1846, a purchaser offered a price for an estate, and the vendor, by a letter sent by post, and received by the purchaser the day after it was put into the post-office, accepted the offer. *Held*, that the vendor was bound by the contract from the time when he posted the letter, although it was not received by the purchaser until the following day. And this rule was adopted by the House of Lords in the still later case of *Dunlop v. Higgins*, 1 House of Lords Cases, 381. It was there laid down, that a letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract, but an answer, posted on the day of receiving the offer, is sufficient; that the contract is accepted by the posting of a letter declaring its acceptance; that a person putting into the post a letter

declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office. See also *Stocken v. Collen*, 7 M. & W. 515.—With the exception of Tennessee, (*Gillespie v. Edmonston*, 11 Hump. 553,) the doctrine of *Adams v. Lindsell* is the established law in this country. *Beckwith v. Cheever*, 1 Foster, 41; *Brisban v. Boyd*, 4 Paige, 17; *Averill v. Hedge*, 12 Conn. 436; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 14 Barb. 341; *Levy v. Cohen*, 4 Geo. 1; *Eliason v. Henshaw*, 4 Wheat. 228; *Chiles v. Nelson*, 7 Dana, 281; *Falls v. Gaither*, 9 Porter, 605; *Hamilton v. Lycoming Mutual Ins. Co.* 5 Barr, 339, where the case of *McCulloch v. Eagle Insurance Co.* is ably examined. The late case of *Taylor v. Merchants Fire Ins. Co.* 9 How. 390, is a strong case on this subject. It was there *held* that where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms; and the house having been burned down whilst the letter of acceptance was in progress by the mail, the company were held responsible. See also *The Palo Alto, Davis*, R. 344. In the late case of *Duncan v. Topham*, 8 C. B. 225, the same principle was adopted, and the contract was said to be closed by mailing the letter of acceptance, although it never reached its destination.

tendering the price may claim the goods ; if the offer was to insure B.'s ship, B. may tender the premium and demand the policy, and hold A. as an insurer of his ship. And so of any other offer or proposition.

* We have supposed these letters to be properly addressed and mailed, and to reach the proper party at a proper time. Cases undoubtedly may occur where there is delay and hindrance, and the cause of this may be the fault of the proposer, or of the acceptor, or of neither. Such cases may form exceptions to the principle above stated, and must be decided on their own facts and merits, and by rules which are specially adapted to them. But we should state as the general rule what was lately declared to be law by the House of Lords ; that if the party receiving an offer by letter, put his answer of acceptance into the mail, he has done all that he could do, and is in no way responsible for the casualties of the mail service. (*kk*)

(*kk*) See *Dunlop v. Higgins*, 1 House of Lords Cases, 381, cited in last note ; *Duncan v. Topham*, 8 C. B. 222.

BOOK III.

.

THE SUBJECT-MATTER OF CONTRACTS.

BOOK III.

CHAPTER I.

PRELIMINARY REMARKS.

THE subject-matter of every contract is something which is to be done, or which is to be omitted. No very precise or logical division and classification of these various things is known to the common law. The division stated and followed in the Pandects, and referred to by Blackstone, (*l*) is exact and rational. It recognizes four species of contracts;—*Do ut Des; Facio ut Facias; Facio ut Des; Do ut Facias*. But this division is not, in the civil law, strictly followed. The whole subject of purchase and sale (*emptio et venditio*,) is treated of before this division is introduced. (*m*) Blackstone says, “of this kind (*Do ut Des*) are all sales of goods.” But in fact it seems to be confined to giving a thing (not money) to receive a thing in return.

It is impossible to make much use of this classification, in exhibiting the rules of the common law in relation to contracts; and the arrangement of the subject-matters of contracts which we have adopted is the following. We shall treat of Contracts,

1. For the Purchase and Sale of Real Estate.
2. For the Hiring of Real Estate.

(*l*) 2 Bl. Comm. 444.

(*m*) *Emptio et venditio*. Pandects, lib. 18, tit. 18. *Do ut des*, &c. Pandects, lib. 19, tit. 5, art. 1, sect. 4.

3. For the Purchase and Sale of Chattels.
4. For the Purchase and Sale of Chattels with warranty.
5. Of the right of Stoppage *in transitu*.
6. For the Hiring of Chattels.
7. Of Guaranty.
8. For the Hiring of Persons.
9. For Service generally.
10. Of and in relation to Marriage.
11. Of Bailment.

Before, however, considering these topics severally, a few words may be said of the remedy which the common law affords, for injury sustained by a breach of a contract to do a specific thing.

Where the thing to be done is the payment of money, there, in general, the remedy is adequate and perfect. But where the thing to be done is any thing else than the payment of money, there the common law can give only a remedy which may be entirely inadequate; for it can give only a money remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of a contract. And even where the contract is specifically for the payment of money and for nothing else, still the law does not, generally, in form, decree an execution of the contract, but damages for the breach of it. If an action be brought upon a promissory note, or a covenant, the plaintiff sets forth the contract and the breach, and does not pray for an execution of it; but he sets forth also the damages he has sustained, and claims them. The action of debt may, it is true, be brought, not only on a bond, but upon many simple contracts; and in this action the payment of the money due is directly demanded, and such is the judgment if the plaintiff recovers; but this action is not much used at the present time, in this country at least, to enforce simple contracts. Where the contract is for any other thing than the payment of money, the common law knows no other than a money remedy; for it has no power to enforce the specific performance of a contract, with the exception only of those money contracts for which debt will lie.

This inability of the common law was among the earlier

and most potent causes which gave rise to courts of equity ; for these courts have, both in England and in this country, a very complete jurisdiction over this class of cases. Perhaps this apparent defect in the common law may be explained, by supposing that originally the action of debt gave the power of compelling performance in fact in the great majority of cases which required it, and that the comparative disuse of this action, and the coming into notice of the great variety of other cases in which this power was needed to do justice, occurred after the forms of the common law had become fixed, and when there was a great unwillingness in the courts to change or enlarge them ; and when also another court had grown up which had full power in all such cases. However this may be, this defect in the common law, which must be felt more and more sensibly, as society advances beyond the point at which it is willing to measure all rights and wrongs by a money standard, is one cause, undoubtedly, of the disposition which is manifesting itself in this country to bring together all common-law and all equity powers of preventing wrong and enforcing right ; as has been done, or attempted to be done, in New York, by their last Revised Code ; and as will, we think, be done in other States of this Union, in some form and in some measure.

CHAPTER II.

PURCHASE AND SALE OF REAL PROPERTY.

CONVEYANCES of real property are made by deed, which we do not propose to consider at present. But simple contracts are often made for the purchase of real estate, and the specific performance of these contracts may be enforced in equity, (*n*) or by actions brought on them at common law. (*o*) Neither equity nor law will enforce such contract, if it be founded upon fraud, (*p*) or gross misrepresentation, (*q*) or upon an intentional concealment of an important defect in or objection to an estate; (*r*) but a mere inadequacy of price is not sufficient to avoid it. (*s*)

(*n*) That specific performance of contracts for the sale or purchase of railway shares will be enforced in equity, see *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 12 Jur. 152; *Wynne v. Price*, 13 Jur. 295. — The idea formerly entertained, that a court of equity might award compensation for non-performance of a contract of sale, is now exploded. *Todd v. Gee*, 17 Ves. 273; *Sainsbury v. Jones*, 5 Myl. & Cr. 1.

(*o*) See *Moses v. McFerlan*, 2 Burr. 1011; *Farrer v. Nightingal*, 2 Esp. 639; *Squire v. Tod*, 1 Camp. 293. It seems that if the subject-matter of the contract be such that both vendor and purchaser would be reimbursed by damages, a court of equity will decline to interfere, and will leave a party to his remedy at law. This is the case in ordinary agreements for the sale of stock. *Cud v. Rutter*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 159. — It has been thought, however, that in some cases a bill in equity for specific performance ought to be maintained in such contracts. See 2 Story, Eq. Juris. § 717, 724.

(*p*) See *Davis v. Symonds*, 1 Cox, 407; *Seymour v. Delancey*, 6 Johns. Ch. 225; *Acker v. Phoenix*, 4 Paige,

305; *Nellis v. Clark*, 20 Wend. 24; *Miller v. Chetwood*, 1 Green's Ch. 199; *Clement v. Reid*, 9 Smedes & Marsh. 535.

(*q*) *Cadman v. Horner*, 18 Ves. 10. In this case the purchaser was plaintiff, and was the seller's agent, and specific performance was refused, because he had represented to the seller that the houses had been injured by a flood, and would require between £40 and £50 to repair them, whereas 40s. would have repaired the damages. See also *Lord Clermont v. Tasburg*, 1 Jac. & Walk. 112; *Barker v. Harrison*, 2 Coll. 546; *Best v. Stow*, 2 Sandf. Ch. 298; *Schmidt v. Livingston*, 3 Edw. 213; *Rodman v. Zilley*, Saxton, 320; *Brealey v. Collins*, Younge, 317.

(*r*) But general statements by a seller, although not the whole truth, will not amount to such misrepresentation as to avoid the contract. See *Fenton v. Browne*, 14 Ves. 144; *Lowndes v. Lane*, 2 Cox, 363.

(*s*) *Whitefield v. McLeod*, 2 Bay, 380; *Stewart v. The State*, 2 Harr. & Gill, 114; *Knobb v. Lindsay*, 5 Ham. 472; *Osgood v. Franklin*, 2 Johns. Ch. R. 1; *Coles v. Trecothick*, 9 Ves. (Sumner's ed.) 234; *Woodcock v. Ben-*

Estates are frequently sold at auction; and in that case the plans and descriptions should be such as will give true information to such persons as ordinarily attend such sales; (t) and if these descriptions are written or printed, and circulated among the buyers, or conspicuously posted in their sight, they cannot be controlled by verbal declarations

net, 1 Cow. 733; *Minturn v. Seymour*, 4 Johns. Ch. R. 500. But inadequacy of price if gross, and attended by circumstances evincing unconscientious advantage taken by the purchaser of the improvidence and distress of the vendor, will avoid the contract in equity, although the contract be executed. *McKinney v. Pinckard*, 2 Leigh, 149; *Evans v. Llewellyn*, 2 Bro. C. C. 150. See *Groves v. Perkins*, 6 Sim. 576; *Sturge v. Sturge*, 14 Jur. 159. And if the inadequacy of price is so gross as to be itself sufficient evidence of fraud, then the contract will be void. See *Rice v. Gordon*, 11 Beavan, 265. But an inequality of price, in order to amount to a fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. *Osgood v. Franklin*, 2 Johns. Ch. R. 23; and see *How v. Weldon*, 2 Ves. Sen. 516; *Gwynne v. Heaton*, 1 Bro. C. C. 9; *Coles v. Trecothick*, 9 Ves. 246. — Although inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, (unless its grossness amounts to fraud,) yet it may be sufficient for the court to refuse to enforce performance. *Osgood v. Franklin*, *supra*; *Mortlock v. Buller*, 10 Ves. 292; *Day v. Newman*, cited in *Mortlock v. Buller*. See also *ante* page *362.

(t) If there is a misdescription in the plan and specification the purchaser is not bound to complete the contract. *Dykes v. Blake*, 4 Bing. N. C. 463. In this case, by the particulars of sale, lot 13 was described as building ground, and the adjoining lot 12 as a villa, subject to liberty for the purchaser of lot 1 to come on the premises to repair drains, &c., as reserved in lot 7. The reservation in lot 7 referred to a lease, which gave the occupier of that and several adjoining lots, composing a row of houses, a carriage-way in common, in front of the lots, and a footway at the back, and also a footway over lot 13. The particulars contained plans

which disclosed the carriage-way in front, and the footway at the back of the houses, but not the footway over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. The plaintiff having purchased lots 12 and 13, by one contract, in ignorance of the footway over lot 13, it was held that the misdescription was such as to entitle him to rescind the contract as to both. See also *Adams v. Lambert*, 2 Jur. 1078; *Robinson v. Musgrove*, 8 C. & P. 469; *Taylor v. Mortindale*, 1 Y. & C. C. 658; *Symons v. James*, Id. 490; *Martin v. Cotter*, 3 Jones & Lat. 506. "If the description be substantially true, and be defective or inaccurate, in a slight degree only, the purchaser will be required to perform the contract, if the sale be fair and the title good. Some care and diligence must be exacted of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales; and therefore, if the purchaser gets substantially the thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price by way of compensation for any small deficiency in the value, by reason of the variation. 2 Kent, Comm. 437; *King v. Bardeau*, 6 Johns. Rep. 38. The estate cannot be too minutely described in the particulars; for, although it is impossible that all the particulars relative to the quantity, the situation, &c., should be so specifically laid down, as not to call for some allowance when the bargain comes to be executed; yet if a person, however little conversant with the actual situation of his estate, will give a description, he must be bound by that whether conversant of it or not. See *Judson v. Wass*, 11 Johns. 525, 3 Cranch, 270, 2 Bay, 11." Dart on Vendors and Purchasers, Am. ed. p. 51, n. 2.

made by the auctioneer at the time of the sale. (u) And even if it be provided in the terms of sale that any error or misstatement in the description shall not avoid the sale, but be allowed for in the price, such provision will not cover any misstatement of a substantial and important character; but the purchaser may, on that ground, rescind the sale. (v) And if the error be wholly unintentional, but such that the amount of compensation to be allowed therefor cannot be exactly calculated, the contract may be rescinded. (w)

(u) *Gunnis v. Erhart*, 1 H. Bl. 289; *Bradshaw v. Bennett*, 5 C. & P. 48; *Cannon v. Mitchell*, 2 Des. 320; *Shelton v. Livius*, 2 Cr. & Jer. 411; *Powell v. Edmunds*, 12 East, 6; *Ogilvie v. Foljambe*, 3 Mer. 53; *Rich v. Jackson*, 4 Bro. C. C. 514; *Wright v. Dekline*, *Peters*, C. C. 199; *Rankin v. Matthews*, 7 Ired. 286. And it makes no difference that the question arises on a sub-sale of the same premises by the purchaser. *Shelton v. Livius*, 2 Cr. & Jer. 411. The rule applies in favor of the seller as well as the purchaser. *Powell v. Edmunds*, 12 East, 6. The case of *Jones v. Edney*, 3 Camp. 285, is not at variance with the rule stated in the text. That was a case of a sale at auction of the lease of a public house. The house was described in the conditions of sale as "*a free public house*;" but the lease under which it was held contained in fact a *proviso* that the lessee and his assigns should take all their beer from a particular brewery. At the sale, the auctioneer read over the whole lease in the hearing of the bidders, and when he came to the proviso, being asked how the house could be called "*a free public house*," he answered: "That clause has been done away with. There has been a trial upon it before Lord *Ellenborough*, who has decided it to be bad. I warrant it as a free public house, and sell it as such." The plaintiff bid off the house and paid a deposit, but afterwards finding that the clause might still be enforced, he brought this action to recover the deposit back. It was *held* that he was entitled to recover. Lord *Ellenborough* said:—"In the conditions of sale this is stated to be '*a free public house*.' Had the auctioneer afterwards verbally contradicted this, I should have paid very little attention to what he said from his pulpit. Men

cannot tell what contracts they enter into, if the written conditions of sale are to be controlled by the babble of the auction room. But here the auctioneer at the time of the sale declared that he warranted and sold this as a free public house. Under these circumstances a bidder was not bound to attend to the clauses of the lease or to consider their legal operation."

(v) *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Stewart v. Alliston*, 1 Mer. 26; *Robinson v. Musgrove*, 2 Moody & Rob. 92; *Leach v. Mullet*, 3 C. & P. 115.

(w) *Dobell v. Hutchinson*, 3 Ad. & El. 355. This was a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of £55, and as comprising a yard. One of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term at £55, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. The court *held* that this defect avoided the sale, and was not a mistake to be compensated for under the above condition; although after the day named in the conditions for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him. See also *Mills v. Oddy*, 2 Crompt. Mees. & Ros. 103.

Wherever there is any material mistake, and no such provision respecting it, the vendor cannot offer a *pro tanto* allowance, and enforce the sale against the purchaser. And these principles would hold in the case of a sale not at auction, so far as they were applicable. (x)

If an estate be sold in separate lots, and one person buy many lots, there is, by the later adjudications and the better reasons, a distinct contract for each lot. (y) But where the contract is written and signed for the purchase of several lots at one aggregate price, it is one contract; and this is so where this contract was subsequent to a sale of the same lots severally and at several prices to the same purchaser. (z) And if a vendor sell an estate as one lot, and has title to a part, but not to the whole, he cannot enforce the sale; (a) but if he sells in several wholly independent lots, it would seem reasonable that he should enforce it as to those to which he could make title, as held by Lord Brougham; (b) but we should not consider the lots as wholly independent, if in point of fact the buying of them all was for any reason a part of the inducement or motive of the buyer in making the purchase.

There has been much question whether a sale at auction might be avoided by the purchaser, because by-bidders or puffers were employed by the owner or auctioneer. The pro-

(x) *Hibbert v. Shee*, 1 Camp. 113; *Robinson v. Musgrove*, 2 Mood. & Rob. 92.

(y) This was expressly held in *Emmerson v. Heelis*, 2 Taunt. 38. See also *James v. Shore*, 1 Stark. 426. The contracts are separate, both in law and fact. *Id.*; *Roots v. Lord Dormer*, 4 B. & Ad. 77; *Baldev v. Parker*, 2 B. & C. 44, *Best, J.*; *Seaton v. Booth*, 4 Ad. & El. 528; *Gibson v. Spurrier*, *Peake's Add. Cas.* 49; *Dykes v. Blake*, 4 Bing. N. C. 463. But see *Van Eps v. Schenectady*, 12 Johns. 436; *Stoddart v. Smith*, 5 Binn. 355; *Waters v. Travis*, 9 Johns. 450.

(z) *Dykes v. Blake*, 4 Bing. N. C. 463. See *Chambers v. Griffiths*, 1 Esp. 150; *Drewe v. Hanson*, 6 Ves. 675; *Hepburn v. Auld*, 5 Cranch, 262; *Osborne v. Bremer*, 1 Des. 486; *Casamajor v. Strode*, 2 Myl. & K. 724; *Lewin*

v. Guest, 1 Russ. 325; *Harwood v. Bland*, Flan. & Kel. 540.

(a) 2 Story, Eq. Jur. § 778; *Reed v. Noe*, 9 Yerg. 283; *Dalby v. Pullen*, 3 Sim. 29; *Bates v. Delavan*, 5 Paige, 300; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Parham v. Randolph*, 4 How. (Miss.) 435. But if the part to which the seller has title was the purchaser's principal object, or equally his object with the other part, and is itself an independent subject, and not likely to be injured by being separated from the other part, equity will compel the purchaser to take it at a proportionate price. See *McQueen v. Farquhar*, 11 Ves. 467; *Bowyer v. Bright*, 13 Price, 698; *Buck v. McCaughtry*, 5 Monroe, 230; *Simpson v. Hawkins*, 1 Dana, 305; *Collard v. Groom*, 2 J. J. Marsh. 488.

(b) *Casamajor v. Strode*, 2 My. & K. 706.

per way is undoubtedly to give notice of such a thing at the sale; but the weight of authority in this country, as well as that of many cases in England, is in favor of permitting an owner, without notice, to employ a person to bid for him, if * he does this with no other purpose than to prevent a sacrifice of the property under a given price. (c) It must be often difficult, however, to draw the line between an honest procedure of this sort and a fraudulent design. It is certain that any unfair conduct on the part of the purchaser in regard to his purchase prevents his acquiring any title to the goods. (d)

At an auction the contract of sale is not completed until the auctioneer knocks the property down to the purchaser; for he is the agent of the vendor, and this is his assent to the offer of the purchaser, and until such assent be given the offer may be withdrawn. (e)

If an auctioneer does not disclose the name of the owner of the property which he sells, he is himself liable to an action by the buyer for the completion of the contract. (f) And it would be so if he sold or warranted without authority. (g) If he has the authority of the owner to warrant, and does so, disclosing the name of the owner, he is himself exonerated from the warranty, and the owner is liable upon it. (h) And he has such special property in the goods that he may bring an action for the price, even if the goods be sold in the house of the owner, and were known to be his. (i) But the

(c) This right, provided there exist no actual intention to defraud, is recognized by many recent authorities. See *Latham v. Morrow*, 6 B. Monroe, 630; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Bowles v. Round*, 5 Ves. Jr. 508, Sumner's ed. and note b.; *Crowder v. Austin*, 3 Bing. 368; *Veazie v. Williams*, 3 Story, 622; *Thornett v. Haines*, 15 M. & W. 371; *Wheeler v. Collier*, Mood. & Malk. 123; *Dart on Vend.* p. 89. *Contra*, *Towle v. Leavitt*, 3 Foster, 360; *Pennock's Appeal*, 14 Penn. 446; *Staines v. Shore*, 16 Penn. 200.

(d) *Fuller v. Abrahams*, 6 Moore, 316, 3 Brod. & Bing. 116; *Smith v. Greenlee*, 2 Dev. 126.

(e) *Paine v. Cave*, 3 T. R. 148; *Rout-*

ledge v. Grant, 4 Bing. 653. If the bid be retracted, the retraction must be made loud enough to be heard by the auctioneer, otherwise it amounts to nothing. *Jones v. Nanney*, McCle. 39, 13 Price, 103.

(f) *Hanson v. Roberdeau*, Peake's Cas. 120; *Franklyn v. Lamond*, 4 C. B. 637; *Mills v. Hunt*, 20 Wend. 431; *Jones v. Littledale*, 6 Ad. & Ell. 486.

(g) *Sugd. Law of Vendors*, 10th ed. vol. 1, p. 70; *Jones v. Dyke*, Id. vol. 3, App. 8; *Gaby v. Driver*, 2 Y. & Jer. 549.

(h) An auctioneer in such case is like any other agent, and, unless he acts beyond his authority, binds his principal, but not himself.

(i) *Williams v. Millington*, 1 H. Bl.

buyer may set off a debt due to him from the owner. (*j*) And if the auctioneer sell the property of A. as the property of B., and the buyer pay the price to B., the auctioneer cannot *recover it of the buyer. (*k*) It is said that after the sale is finished the auctioneer is no longer the agent of the owner, and a payment to him of the price is not a payment to the owner. (*l*) But where the auctioneer, by usage, or on other

81; *Coppin v. Walker*, 7 Taunt. 237. But where the person employing the auctioneer to sell has no right so to do, the auctioneer has no claim upon the property against the rightful owner, and the purchaser may refuse to pay the auctioneer. *Dickenson v. Naule*, 1 Nev. & Man. 721.

la (*j*) *Coppin v. Craig*, 7 Taunt. 243.

(*k*) *Coppin v. Walker*, 7 Taunt. 237.

(*l*) *Sykes v. Giles*, 5 M. & W. 645.

In this case the plaintiff having employed an auctioneer to sell certain timber growing on his estate, the following, amongst other conditions, were read at the sale, in the presence of the defendant:—"That each purchaser should pay down a deposit of £10 per cent. in part of the purchase-money, and pay the remainder on or before the 17th of August; but in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of £5 per cent. will be allowed." Also, "that each purchaser shall enter into a proper agreement and bond, if required, with such one, two, or more sureties as shall be approved by the vendor or his agent, for the performance of his agreement, pursuant to the above conditions." The defendant became the purchaser of one lot, and paid the deposit. Some days after the sale, which was on the 14th of February, the defendant, at the auctioneer's request, drew a bill of exchange for the residue of the purchase money, dated on the day of the sale, on one J. M., payable six months after date to his own order, and indorsed it to the auctioneer, who, being in difficulties, indorsed it to a third person, to whom he was indebted on his own account. The bill became due on the 17th of August, when the amount of it was duly paid to the holder. It was never transferred to the plaintiff. *Held*, that, under these circumstances, the delivery and payment of the bill of exchange was not a

valid payment of the residue of the purchase-money for the timber purchased by the defendant, the auctioneer having no authority to receive payment of such residue, or to take any security for the payment of it; but that even if he were authorized by the conditions to receive payment, the payment required was a payment in cash, and he had no authority to take a bill of exchange. *Parke, B.*:—"The question here is, what authority the auctioneer had. The extent of that authority, in the absence of any proof of general authority, must depend upon the conditions of sale. The only authority given to the auctioneer by these conditions is, to receive the deposit money; the vendor reserves to himself or his agent the power to receive the remainder of the purchase-money. As no agent is named for that purpose, the payment must be to the principal, or some general agent, which the auctioneer certainly was not; for the word 'agent' in the sixth condition clearly does not refer to him. By the third condition the remainder of the money is to be paid on or before the 17th of August, but such payment is not to be to the auctioneer, but the vendor. Then that part of the condition which provides that the purchaser may, if he shall prefer it, pay the whole money at an earlier period, must also be construed to mean that he shall pay it to the same person, that is, the vendor or his agent. But even if the auctioneer had had authority to receive the remainder of the purchase money, he had no authority to receive it in this way by means of a bill of exchange. Cash payment was intended, and not a bill of exchange. My opinion, however, is, that, under the terms of the conditions of sale, the vendor is to receive the purchase-money, and not the auctioneer. The general rule may be peculiar, but this case turns on this peculiar construction of the conditions of sale."

evidence, can be shown to have authority to receive the money, such payment must discharge the buyer. (*m*) It is the duty of the auctioneer to obtain the best price he fairly * can; to comply with his instructions, unless they would operate a fraud; to pursue the accustomed course of business, and to possess a competent degree of skill; and if he fail in either of these particulars, and damage ensues to the owner, he is responsible therefor. (*n*)

In the preceding remarks we have given the rules of law applicable to auction sales of personal as well as of real property. They are the same in both cases, except so far as they are necessarily distinguished by the nature of the property sold.

(*m*) See *Capel v. Thornton*, 3 Car. & Pay. 352; *Bunney v. Payntz*, 4 B. & Ad. 568. The case of *Sykes v. Giles*, above cited, does not impugn this rule, but turned upon the special conditions of the sale.

(*n*) See *Guerreiro v. Peile*, 3 B. & Ald. 616; *Bexwell v. Christie*, Cowper, 395; *Russell v. Palmer*, 2 Wilson, 325.

CHAPTER III.

HIRING OF REAL PROPERTY.

Sect. I. — *Of the Lease.*

THE hiring of real property is usually effected by means of a lease, which is a contract, whereby one party—the tenant—has the possession and profits of the land, and the other party—the landlord—reserves a rent, which the tenant pays him by way of compensation.

It is frequently a question whether an instrument is a lease at once, or only an agreement to make a lease hereafter; and if a lease, when by its terms it is to begin, and when to end; and whether the tenancy is for years, or from year to year, or at will, or upon sufferance. But these questions are properly questions of construction, and so far as they come within the scope of this work will be considered hereafter, when we treat of Construction, and of the Statute of Frauds, in our second volume.

Any general description will suffice to pass the demised premises, if it be capable of distinct ascertainment and identification. And certain words, usually employed, as house, farm, land, and the like, have, if necessary, a very wide meaning. (o) And where such general and comprehensive terms are employed, all things usually comprehended within the meaning thereof will pass, unless the circumstances of the case show very clearly that the intention of the parties was otherwise. (p) And inaccuracies as to qualities, names, amounts, &c., will be rejected, if there be enough to make the purposes and intentions of the parties certain. (q) So the granting for hire, of a thing to

(o) 1 Shep. Touch. 90–92.

(p) Doe v. Burt, 1 T. R. 701; Bryan v. Wetherhead, Cro. Car. 17; Jennings v. Lake, Id. 168; Kerslake v. White, 2 Stark. 508; Ongley v. Chambers, 1 Bing. 483, 496.

(q) Miller v. Travers, 1 M. & Sc. 342, 351; Blague v. Gold, Cro. Car. 473; Mason v. Chambers, Cro. Jac. 34; Wrotesley v. Adams, Plowd. 187, 191; Windham v. Windham, Dyer, 376, b; Goodtitle v. Southern, 1 M. & S. 299;

be used, carries with it all proper appurtenances and accompaniments which are needed for the proper use and enjoyment of the thing. (*r*)

SECTION II.

OF THE GENERAL LIABILITIES OF THE LESSOR.

There is an implied covenant on the part of the lessor to put the lessee into possession, and that he shall quietly enjoy. (*s*) But unless the demise be under seal there is no implied covenant for good title, but only for quiet enjoyment. (*ss*) He is not bound to renew, without express covenant, (*t*) nor are such covenants favored, if they tend to perpetuity, (*u*) but where they are definite and reasonable the law sustains them. (*v*) A covenant to "renew under the same covenants" is satisfied by a renewal which omits the covenant to renew. (*w*) But a covenant to *renew* implies a renewal for the same term and rent, and, probably, on the same conditions as before, excepting only the covenant to renew; but if it be "to renew on such terms as may be agreed upon," this is void for uncertainty. (*x*)[•]

A landlord is under no implied legal obligation to repair, nor will the uninhabitableness of a house be a good defence to an action for rent. (*y*) And if he expressly covenanted to repair, the tenant cannot quit and discharge himself of the

Doe v. Galloway, 5 B. & Ad. 43; *Pim v. Curell*, 6 M. & W. 234, 269.

(*r*) *Shep. Touch.* 89; *Morris v. Edgington*, 3 Taunt. 24, 31; *Koostra v. Lucas*, 5 B. & Ald. 830; *Harding v. Wilson*, 2 B. & C. 96.

(*s*) *Line v. Stephenson*, 4 Bing. N. C. 678, 5 Id. 183; *Holden v. Taylor*, Hob. 12; *Hacket v. Glover*, 10 Mod. 142; *Shep. Touch.* 165; *Nokes's Case*, 4 Co. 80 b. — Assumpsit lies against a landlord on his implied promise to give possession. *Coe v. Clay*, 3 M. & P. 57.

(*ss*) *Bandy v. Cartwright*, 20 E. L. & E. 374.

(*t*) *Lee v. Vernon*, 7 Bro. P. C. 432; *Robertson v. St. John*, 2 Bro. C. C. 140.

(*u*) *Baynham v. Guy's Hospital*, 3

Ves. 295; *Att'y-General v. Brooke*, 18 *Ves.* 319, 326.

(*v*) *Furnival v. Crew*, 3 Atk. 83; *Cooke v. Booth*, Cowp. 819; *Willan v. Willan*, 16 *Ves.* 72, 84.

(*w*) *Carr v. Ellison*, 20 *Wend.* 178. See also *Abeel v. Radcliff*, 13 *Johns.* 297. But see, *contra*, *Bridges v. Hitchcock*, 1 Bro. P. C. 522.

(*x*) *Rutgers v. Hunter*, 6 *Johns. Ch.* 215; *Whitlock v. Duffield*, 1 *Hoff. Ch.* 110; *Tracy v. Albany Exchange Co.*, 3 *Selden*, 472.

(*y*) *Ruden v. Pullen*, 10 M. & W. 321; *Hart v. Windsor*, 12 M. & W. 68; *Izon v. Gorton*, 5 Bing. N. C. 501; *Gott v. Gandy*, 22 E. L. & E. 173; *Moffat v. Smith*, 4 *Coms.* 126. The cases *contra*, as *Collins v. Barrow*, 1 M.

rent because the repairs are not made, unless there is a provision to that effect. (z) And if a landlord is bound by custom or by express agreement to repair, this obligation, and the obligation * of the tenant to pay rent, are, it seems, independent of each other, so that the refusal or neglect of the landlord to repair is no answer to a demand for rent. (a) It would seem from the authorities above cited, to be the law in England, that a tenant is justified in avoiding his lease, only by a positive wrong on the part of his landlord; as by erroneous or fraudulent misdescription of the premises or their being made uninhabitable by the landlord. (b)

SECTION III.

OF THE GENERAL LIABILITY AND OBLIGATION OF THE TENANT.

The words "reserving," or "yielding," or "paying" a rent, or any phraseology distinctly showing the intention of the parties that rent should be paid, imply a covenant or promise on the part of the lessee to pay the same, although the words import no promise. And he is liable to an action either for non-payment of rent, or for refusing to take possession. (c) He is not bound to pay the taxes, unless he agrees to; but the agreement may be indirect and constructive; as if he agrees to pay the rent, "free from all taxes, charges, or impositions," (d) or even to pay "a net rent;" (e) or any other language is used, distinctly showing that this burden was to be cast upon the tenant.

& Rob. 112; *Edwards v. Etherington*, 7 D. & R. 117; *Salisbury v. Marshall*, 4 C. & P. 65, seem to be overruled.

(z) *Surplice v. Farnsworth*, 7 M. & Gr. 576.

(a) Bro. Abr., Dette, pl. 18; 27 H. 6, 10 a, pl. 6. See also the reporter's learned note to *Surplice v. Farnsworth*, where this case, and others to this point from the Year Books, are given in full.

(b) See *Surplice v. Farnsworth*, 7 M. & Gr. 576; *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, 12 M. &

W. 52; *Arden v. Pullen*, 10 M. & W. 321.

(c) See Platt on Covenants, 50. The learned author of this treatise maintains, however, with great ability and learning, that an action of *covenant* will lie in such case only when the lease is made by indenture executed by the lessee.

(d) *Bradbury v. Wright*, Doug. 624. But see, *contra*, *Cranston v. Clarke*, Sayer, 78.

(e) *Bennett v. Womack*, 3 C. & P. 96, 7 B. & C. 627.

The time when the rent is due depends upon the terms of the contract; and, if this were silent, the time would depend upon statutory provision, if any there were, and in the absence of such provision, upon the usage of the country. * Whenever it is due, if no place of payment is fixed by the contract and there is a clause of reëntury and forfeiture in case of non-payment, a readiness to pay upon the land would be necessary to prevent a forfeiture, and as the law could not in such a case compel a tenant to seek the landlord off the land to pay the rent and at the same time be ready upon the land with the money to prevent a forfeiture, it would seem that a readiness to pay upon the land would also be a good plea of tender in an action for the rent (*f*) although the tenant might, if he chose, make a personal tender which would be good. (*ff*) But we hold, with the latest English authority, that if there be no clause of forfeiture in the lease the tenant must seek the landlord and tender the rent as in other cases, in order to prevent the landlord from recovering the costs of an action; (*g*) although the American cases lead to a different conclusion. (*gg*) And a tender of rent on the day it fell due, although at a late hour in the evening, has been held good. (*h*)

A tenant is not bound to make general repairs, without an express agreement. But he must make such repairs as are made necessary by his use of the house, and are required to keep the premises in tenantable condition. And even if an accident occur without his having any thing to do with it, as if a window were broken, or slates cast from the roof, he must repair, if serious injury will obviously result in case the accident be left without repair. (*hh*) In general, an outgoing tenant must leave the premises wind and water tight, but is not bound to any ornamental repair, as painting, papering, &c., although so broad a covenant on his part as "to leave the premises in good and sufficient repair, order, and con-

(*f*) *Haldane v. Johnson*, 20 E. L. & E. 498.

(*ff*) *Hunter v. Le Conte*, 6 Cow. 728.

(*g*) *Haldane v. Johnson*, 20 E. L. & E. 498.

(*gg*) *Hunter v. Le Conte*, 6 Cow. 728; *Walter v. Dewey*, 16 Johns. 222.

(*h*) *Thomas v. Hayden*, cited in *Perkins v. Dana*, 19 Verm. 589.

(*hh*) *Ferguson v. —*, 2 Esp. 590;

dition," might cover these repairs. (*i*) But if he expressly agrees to keep the premises in repair, and deliver them up in good repair, he is not justified in permitting them to remain out of repair by the fact that they were so when he received them. (*j*) If there be an express and unconditional agreement to repair, or to redeliver in good order, or to keep in good repair, the tenant is bound to do this, even though the premises are destroyed by fire, so that he is in fact compelled to rebuild them, (*k*) but not if destroyed by the act of God or the public enemies. (*kk*) Where the tenant *contracts to repair, there is no implied promise to use premises in a tenant-like manner, (*l*) but such tenant is liable to third parties for damages resulting from the ruinous state of the premises; and the landlord is not, if the premises were in good order when leased. (*m*) But the tenant is not made liable by this agreement for acts done before the execution of the indenture, although its *habendum* states that the premises are to be held from a day prior to the day of the execution. (*n*) And an under-lessee, with covenants to repair, is liable to his immediate landlord, only for such damages as result directly from the breach of his own contract; and not for such as the owner may recover from the mesne landlord. (*o*)

The tenant of a farm is bound, without express cove-

Gibson v. Wells, 4 B. & P. 290; Pomfret v. Ricroft, 1 Wms. Saund. 323, b, n. 7; Horsefall v. Mather, Holt, N. P. 7; Auworth v. Johnson, 5 C. & P. 239; Torriano v. Young, 6 C. & P. 8.

(*i*) Wise v. Metcalf, 10 B. & C. 312. But a declaration stating that in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend £60 worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer; those obligations not arising out of the bare relation of landlord and tenant. Brown v. Crump, 1 Marsh. 567. See also Granger v. Collins, 6 M. & W. 458; Jackson v. Cobbin, 8 M. & W. 790.

(*j*) Payne v. Haine, 16 M. & W. 541. But the age and character of the premises must be considered in determining the proper extent of the repairs.

Id. See also Mantz v. Goring, 4 Bing. N. C. 451; Burdett v. Withers, 7 Ad. & El. 36; Belcher v. McIntosh, 2 M. & R. 186.

(*k*) 40 Ed. 3, 6, pl. 11; Paradine v. Jane, Aleyn, 27; Bullock v. Dommitt, 6 T. R. 650; Brecknock Canal Co. v. Pritchard, 6 T. R. 750; *In re Skingley*, 3 E. L. & E. 91; Allen v. Culver, 3 Denio, 284; Spence v. Chodwick, 10 Q. B. 517, 530; Phillips v. Stevens, 16 Mass. 238; Fowler v. Bott, 6 Mass. 63. (*kk*) Bayly v. Lawrence, 1 Bay, 499; Pollard v. Shaafer, 1 Dallas, 210. See Proctor v. Keith, 12 B. Mon. 252.

(*l*) Standen v. Chrinnas, 10 Q. B. 35.

(*m*) Bears v. Ambler, 9 Barr, 193.

(*n*) Shaw v. Kay, 1 Exch. 412.

(*o*) Logan v. Hall, 4 C. B. 598; Walker v. Hatton, 10 M. & W. 249; Penley v. Watts, 7 M. & W. 601. But see *contra*, Neale v. Wyllie, 3 B. & C. 533.

nants, to manage and cultivate the same in such manner as may be required by good husbandry and the usual course of management of such farms in that vicinity. And if he fails to do so, assumpsit may be maintained on the breach of the implied promise. (*p*)

It is no answer to a demand for rent that the premises are not in a fit and proper state and condition for the purposes for which they are hired. (*q*) If, therefore, the premises are burned down, and the tenant is under no obligation to rebuild, (not having agreed to keep in repair,) or are destroyed by the act of God or the public enemies, yet he is bound to pay rent thereafter, (*qq*) unless, as is now frequently done in this country, the lease contains a provision, that the rent shall cease or proportionally abate while the premises remain wholly or in part unfit for use.

In the absence of express agreement to repair, the lessee *is not bound to rebuild a house, which has been burned through the negligence and folly of his own servants. (*r*)

A lessee may assign over the whole or a part of his term in the premises. If he parts with the whole of his interest it is an assignment; if with less than the whole it is an under-lease, leaving a reversion in the original lessee. An under-lease is not a breach of a covenant "not to assign, transfer, or set over" the premises, or the lease, or the interest or estate of the lessee; (*s*) but if there be added to the covenant

(*p*) *Powley v. Walker*, 5 T. R. 373; *Beale v. Sanders*, 3 Bing. N. C. 850; *Brown v. Crump*, 1 Marsh. 567. See also *Wigglesworth v. Dallison*, Doug. 201; *Legh v. Hewitt*, 4 East, 154; *Senior v. Armytage*, Holt, N. P. 197; *Gough v. Howard*, Peake's Add. Cas. 197; *Dalby v. Hirst*, 1 Br. & Bing. 224, 3 Moore, 536; *Angerstein v. Handson*, 1 C. M. & R. 789; *Hutton v. Warren*, 1 M. & W. 466; *Hallifax v. Chambers*, 4 M. & W. 662; *Lewis v. Jones*, 17 Penn. 262.

(*q*) *Hart v. Windsor*, 12 M. & W. 68; *Surplice v. Farnsworth*, 7 M. & Gr. 576; *Harrison v. Lord North*, 1 Ch. Cas. 83.

(*qq*) *Pollard v. Shaffer*, 1 Dallas, 210; *Niedelet v. Wales*, 16 Missouri, 214; *Fowler v. Bott*, 6 Mass. 62; *Lemott v. Skerrett*, 1 Har. & J. 42; *Wag-*

ner v. White, 4 H. & J. 546; *Redding v. Hall*, 1 Bibb, 536.

(*r*) *McKenzie v. McLeod*, 10 Bing. 385.

(*s*) *Crusoe v. Bugby*, 2 W. Bl. 766, 3 Wils. 234; *Kinnersley v. Orpe*, Doug. 56; *Church v. Brown*, 15 Ves. 258, 265. — But a covenant against *underletting* will restrain the alienation by assignment. *Greenaway v. Adams*, 12 Ves. 395. — Letting lodgings is not a breach of covenant not to underlet. *Doe d. Pitt v. Laming*, 4 Camp. 73. — And an assignment by operation of law is no breach of a covenant not to assign; as in case of bankruptcy, or where the term is taken on execution by a creditor. *Doe v. Carter*, 8 T. R. 57. But it is otherwise if the assignment is the *voluntary* act of the tenant. *Doe v. Carter*, 8 T. R. 57, 300; *Doe v. Hawke*, 2

the words "or any part thereof," it is equally a breach, to underlet or to assign. By such breach the original lessee becomes liable for damages; but the lease is not terminated, or the interest of the sub-lessee destroyed, unless the original lease is made *on condition* that there shall be no assignment, nor underleasing, or provides that the original lessor may, upon any assignment or underleasing, enter and expel the lessee or his assigns, and terminate the lease.

A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine it by reëntry; and it was held that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent, or other act of intended confirmation; while in the latter, some act, such as entry or claim, must have been performed by the lessor to manifest his intention to end the demise, which was voidable in the interval, and consequently confirmable. This distinction, however, is now exploded; and it is held that the lease is *voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declare that it shall be void. (t) And any act will be a waiver of the forfeiture, which is a distinct and voluntary recognition of the lease by the lessor, with a full knowledge of the forfeiture; as by taking rent, &c. (u) Whether a mere demand of subsequent rent is a waiver is not so certain. (v) A waiver of the forfeiture for one breach does not prevent the lessor from insisting on the forfeiture for another. (w) The sub-lessee is not liable to the original lessor, there being no privity between

East, 481. It would seem, therefore, that taking the benefit of an insolvent law would be a breach of the covenant.

See *Shée v. Hale*, 13 Ves. 404. And if the lease be made subject to a condition that the premises shall be actually occupied by the lessee, the lease will of course determine whenever the condition is broken, whether it be by the voluntary act of the party or by operation of law. *Doe v. Clarke*, 8 East, 185.

(t) See *Platt on Leases*, vol. 2, p. 327, and *Taylor on Landlord and Te-*

nant, 2d ed. p. 322, where this point is fully considered, and cases cited.

(u) *Roe d. Gregson v. Harrison*, 2 T. R. 425; *Doe d. Nash v. Birch*, 1 M. & W. 402; *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384; *Arnsby v. Woodward*, 6 B. & C. 519; *Harvie v. Oswel*, Cro. Eliz. 572; *Goodright d. Walter v. Davids*, Cowp. 803.

(v) *Doe d. Nash v. Birch*, 1 M. & W. 406.

(w) *Doe d. Boscawen v. Bliss*, 4 Taunt. 735; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376.

them. But if the whole term and interest be assigned by the termor, the assignee—who is not a sub-lessee, as there is no reversion in the termor,—is now liable to the original lessor for rent, by reason of his privity of estate. (x)

Where the letting is in the alternative, as for two, four, or eight years, the tenant may determine the tenancy at either of these periods by a proper notice, unless it be otherwise expressly agreed. (y)

A tenant may not dispute his landlord's title; for he is estopped from changing, by his own act, the character and effect of his tenure. (z) And wherever a tenant disclaims his tenure, or denies his landlord's title, or claims adversely to him, or attorns to another as having title against him, he forfeits his estate. The landlord may enter at once, and bring ejectment for the forfeiture. But this is a disclaimer * of the lease by the landlord, who cannot thereafter take any advantage from the tenancy. (a) But a disclaimer by a tenant will work a forfeiture only when it amounts to a renunciation of his character as a tenant, which may be either by setting up a title in another or claiming title in himself. (aa) A refusal to pay rent, together with a request for further information as to the landlord's title, or a delay until conflicting claims are settled, seems not to be sufficient to work a forfeiture. (bb)

(x) *Stevenson v. Lambard*, 2 East, 575. See also *ante*, p. 199, and note (q).

(y) *Dann v. Spurrier*, 3 B. & P. 399; *Goodright d. Hall v. Richardson*, 3 T. R. 462. Where a house was leased at a certain rent "to be paid quarterly, or half quarterly if required," and the tenant entered and paid his rent quarterly for one year, after which the landlord, without previous demand or notice, distrained for half a quarter's rent, alleged to be then due, it was *held* that he had no right so to do, but must give previous notice of his election. *Mallam v. Arden*, 10 Bing. 299.

(z) *Doe d. Higginbotham v. Barton*, 11 Ad. & El. 307; *Fleming v. Gooding*, 10 Bing. 549; *Doe d. Knight v. Smythe*, 4 M. & S. 347; *Alchorne v. Gomme*, 2 Bing. 54; *Gravenor v. Woodhouse*, 7 Moore, 289; *Parry v. House*, Holt, N. P. 489, and the learned note by the reporter; *Willison v. Watkins*, 3 Peters,

43; *Den d. Freeman v. Heath*, 13 Ire. L. 498; *Fusselman v. Worthington*, 14 Ill. 135; *Pierce v. Minturn*, 1 Cala. 470. But see *Mountney v. Collier*, 16 E. L. & E. 232; *Den d. Howell v. Ashmore*, 2 New Jer. 265; *Shultz v. Elliott*, 11 Humph. 183.

(a) *Greeno v. Munson*, 9 Verm. 37; *Hall v. Dewey*, 10 Verm. 593; *Carpenter v. Thompson*, 3 New Hamp. 204; *Blake v. Howe*, 1 Aikens, 306; *Lord v. Bigelow*, 8 Verm. 445; *Doe d. Jefferies v. Whittick*, Gow, 195; *Doe d. Calvert v. Frowd*, 4 Bing. 557; *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Doe d. Whitehead v. Pittmann*, 2 N. & M. 673; *Doe d. Bennett v. Long*, 9 C. & P. 773; *Doe d. Davies v. Evans*, 9 M. & W. 48.

(aa) *Doe d. Williams v. Cooper*, 1 M. & G. 135.

(bb) *Doe d. Lewis v. Cawdor*, 1 C. M. & R. 398; *Doe d. Gray v. Stanion*,

The payment of rent admits *prima facie*, a tenancy by implication; (*cc*) but this inference may be prevented and the evidence rebutted by showing that the payment was made under a mistake. (*dd*)

SECTION IV.

OF SURRENDER OF LEASES, BY OPERATION OF LAW.

Such surrender takes place when the lessee does something incompatible with the lease; and the lessor assents or coöperates. As if the lessor gives and the lessee accepts a valid new lease. (*b*) There is, perhaps, no better definition of the acts which make a surrender in law, than to say that they are such acts as in contemplation of law are acts of notoriety; as formal and solemn as the execution of a deed, or livery, entry, and acceptance of an estate. (*c*) The surrender may be by substituting a new lease between the same parties, as we have seen, or a new lessee instead of the old one. (*d*) But the mere agreement for substitution is not enough; there must be an actual change of possession, and an actual reception by the lessor of the new tenant in the stead of the old one; (*e*) otherwise the new tenant is but the assignee or sub-lessee of the old one. Or it may be a surrender and abandonment of the premises to the landlord, he accepting the same, and no new contract substituted. (*f*)

1 M. & W. 695; Doe *d.* Williams *v.* Pasquali, Peake, 196.

(*cc*) Gouldsworth *v.* Knights, 11 M. & W. 337; Fenner *v.* Duplock, 2 Bing. 10.

(*dd*) Claridge *v.* Mackenzie, 4 M. & G. 143; Doe *d.* Higginbotham *v.* Barton, 11 Ad. & El. 307; Doe *d.* Plevin *v.* Brown, 7 Ad. & El. 447.

(*b*) Lyon *v.* Reed, 13 M. & W. 285; Doe *d.* Biddulph *v.* Poole, 11 Q. B. 713.

(*c*) Parke, B., Lyon *v.* Reed, 13 M. & W. 309; Co. Litt. 352, a. See also Crowley *v.* Vitty, 9 E. L. & E. 501.

(*d*) Stone *v.* Whiting, 2 Stark. 235; Thomas *v.* Cook, 2 Stark. 408, 2 B. & Ald. 119; Lyon *v.* Reed, 13 M. & W. 285; Doe *d.* Hull *v.* Wood, 14 M. &

W. 682; Nickells *v.* Atherstone, 10 Q. B. 944; Whitney *v.* Meyers, 1 Duer, 266.

(*e*) Graham *v.* Whichelo, 1 C. & M. 188; Taylor *v.* Chapman, Peake's Add. Cas. 19. See also M'Donnell *v.* Pope, 13 E. L. & E. 11; Barlow *v.* Wainwright, 22 Verm. 88.

(*f*) Reeve *v.* Bird, 1 C. M. & R. 31. In Grimman *v.* Legge, 8 B. & C. 324, A. demised to B. the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately. The latter answered, she might go when she pleased. B. quitted and A. accepted possession of the apartments: *Held*, that A. could

An acceptance of rent, by the lessor, from a third party, is *primâ facie* only an acceptance of rent paid by the lessee through an agent; (g) but if this presumption be rebutted by facts going to show that the landlord had given up the lessee, and had nothing more to do with him, and treated the new occupant as his lessee, this will amount to a surrender. For the landlord cannot hold both as his lessees. (h)

SECTION V.

OF AWAY GOING CROPS.

A tenant whose estate is terminated by an uncertain event which he could neither foresee nor control, is entitled to the annual crop which he sowed while his estate continued, by the law of Emblements. But a tenant for years knows when his lease will expire. Nevertheless, he has usually some right to the crop he sowed, and to so much possession of the land as may be necessary to getting in the crop; but this right must depend either on agreement or on usage. At common law he has no such right. (i) The local usages of this country, in this respect, vary very much, and are not often distinctly defined or well established. Thus, there is some uncertainty as to the property in the manure of a farm. Generally, in this country, the outgoing tenant cannot sell

neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent *pro ratâ* for the actual occupation of the premises for any period short of the quarter. See also *Dodd v. Acklom*, 6 M. & G. 672.

(g) *Copeland v. Wattss*, 1 Stark. 95.

(h) *Reeve v. Bird*, 1 C. M. & R. 31; *Walls v. Atcheson*, 11 Moore, 379; *Woodcock v. Nuth*, 8 Bing. 170; *Thomas v. Cook*, 2 B. & Ald. 119; *Johnstone v. Huddleston*, 4 B. & C. 922.

(i) *Caldecott v. Smythies*, 7 C. & P. 808; *Wigglesworth v. Dallison*, Doug. 201. See also *Griffiths v. Puleston*, 13 M. & W. 358; *Strickland v. Maxwell*, 2 C. & M. 539; *Boraston v. Green*, 16

East, 71; *Davis v. Connop*, 1 Price, 53; *Beavan v. Delahay*, 1 H. Bl. 5; *Knight v. Benett*, 3 Bing. 364; *Hutton v. Warren*, 1 M. & W. 466; *Senior v. Armytage*, Holt, N. P. 197; *Webb v. Plummer*, 2 B. & Ald. 746; *Holding v. Pigott*, 7 Bing. 465. By the custom of Pennsylvania, the right of the tenant for a definite term to his away-going crops seems to be well established. *Diffendorffer v. Jones*, cited in *Carson v. Blazer*, 2 Binn. 487, and in *Stultz v. Dickey*, 5 Binn. 289; *Comfort v. Duncan*, 1 Miles, 229; *Demi v. Bossler*, 1 Penn. 224. Such is the case also in New Jersey. *Van Doren v. Everitt*, 2 South. 460; *Templeman v. Biddle*, 1 Harring. 522.

or take away the manure, (*j*) although it would seem that in England he can. (*k*)

SECTION VI.

OF FIXTURES.

The tenant may annex some things to the freehold, and yet retain the right to remove them. These things are called Fixtures. (*l*) There are no precise and certain rules, by which we can always determine what are and what are not removable. The method of affixing is a useful criterion; but not a certain one. For doors, windows, blinds, and shutters, although capable of removal without injury to the house, and in fact detached at the time of transfer, nevertheless pass with the house; while mirrors, wardrobes, &c., although far more strongly fastened, would still be chattels. (*m*) In modern times this rule is construed much more strongly in favor of the tenant, and against the landlord, than formerly; (*mm*) and more so in respect of things put up for purposes of trade or manufacture than for other things. As between the seller and purchaser it is construed strongly against the seller. Many things pass by a deed of a house, *being put there by the owner and seller, which a tenant who had put them there might have removed. In general, it may be said, that what a tenant has added he may remove, if he can do so without any injury to the premises, unless he has actually built it in, so as to make it an integral part of what was there originally. (*n*)

(*j*) *Lassell v. Reed*, 6 Greenl. 222; *Staples v. Emery*, 7 Greenl. 201; *Daniels v. Pond*, 21 Pick. 367, 371; *Lewis v. Lyman*, 22 Pick. 437, 442; *Middlebrook v. Corwin*, 15 Wend. 169; *Lewis v. Jones*, 17 Penn. 262. See also *Kittredge v. Woods*, 3 New Hamp. 503.

(*k*) See *Roberts v. Barker*, 1 C. & M. 808. In New Hampshire it has been held that where land is sold and conveyed, manure lying about a barn upon the land will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed. *Kittredge*

Woods, 3 New Hamp. 503; *Conner v. Coffin*, 2 Foster, 539. See also *Parsons v. Camp*, 11 Conn. 525; *Goodrich v. Jones*, 2 Hill, 142.

(*l*) See *Hallen v. Runder*, 1 C. M. & R. 266, 276; and *Amos and Ferard on Fixtures*, p. 2, for this definition. But the word is, perhaps, quite as often used to denote those things which, being added, cannot be removed.

(*m*) *Winslow v. Merchant's Ins. Co.* 4 Met. 306, 314.

(*mm*) *Dubois v. Kelly*, 10 Barb. 496.

(*n*) We give below a statement of all

SECTION VII.

OF NOTICE TO QUIT.

A tenant whose tenancy may be determined by the will of the landlord is entitled to notice of that determination, nor

the things which have been held removable, and of those which have been held not removable. But it must be remembered that each decision rested, more or less, upon the peculiar circumstances of the case, and may fail as authority when applied to another case which apparently resembles it. — 1. List of things held not to be removable: — Agricultural erections, *Elwes v. Maw*, 3 East, 38; *Contrà*, *Dubois v. Kelly*, 10 Barb. 496; Ale-house bar, *Kinlyside v. Thornton*, 2 Wm. Bl. 1111; Barns fixed in the ground, *Elwes v. Maw*, *supra*; Beast-house, *Ib.*; Benches affixed to the house, *Co. Litt.* 53, a; Box-borders, not belonging to a gardener by trade, *Empson v. Soden*, 4 B. & Ad. 655; Carpenter's shop, *Elwes v. Maw*, *supra*; Cart-house, *Ib.*; Chimney-piece, not ornamental, *Leach v. Thomas*, 7 C. & P. 327; Closets affixed to the house, *Kimpton v. Eve*, 2 Ves. & Bea. 349; Conduits, *Nicholas v. Chamberlain*, *Cro. Jac.* 121; Conservatory, substantially affixed, *Buckland v. Butterfield*, 2 B. & B. 54; Doors, *Cooke's case*, *Moore*, 177; Dressers, *Kinlyside v. Thornton*, *supra*; Flowers, *Littledale, J.*, in *Empson v. Soden*, *supra*; Fold-yard walls, *Elwes v. Maw*, *supra*; Fruit trees, if tenant be not a nursery-man by trade, *Wyndham v. Way*, 4 Taunt. 316; Fuel-house, *Elwes v. Maw*, *supra*; Glass windows, *Co. Litt.* 53, a, *Herlakenden's case*, 4 Co. 63; Hearths, *Poole's case*, 1 Salk. 368; Hedges, *Parke, J.*, in *Empson v. Soden*, *supra*; Locks and keys, *Liford's case*, 11 Co. 50, *Cowen, J.*, in *Walker v. Sherman*, 20 Wend. 636, 639; Millstones, 14 H. viii. 25, b, pl. 6, *Liford's case*, *supra*; The Queen *v. Wheeler*, 6 Mod. 187, *Shep. Touch.* 90; Manure, *Daniels v. Pond*, 21 Pick. 367, *Middlebrook v. Corwin*, 15 Wend. 169, *Lassell v. Reed*, 6 Greenl. 222. But see *Staples v. Emery*, 7 Greenl. 201; Partitions, *Kinly-*

side v. Thornton, *supra*; Pigeon-house, *Elwes v. Maw*, *supra*; Pineries, substantially affixed, *Buckland v. Butterfield*, *supra*; Pump-house, *Elwes v. Maw*, *supra*; Trees, *Empson v. Soden*, *supra*; Wagon-house, *Elwes v. Maw*, *supra*; Threshing-machines, fixed by bolts and screws to posts let into the ground, *Wiltshier v. Cottrell*, 18 E. L. & E. 149. — 2. Things held to be removable, though not coming within the class of trade fixtures: — Arras-hangings, *Bridgeman's case*, 1 Rol. Rep. 216; Barns, resting by weight alone upon foundations let into the ground, or upon blocks, *Wansborough v. Maton*, 4 Ad. & El. 884, *Bul. N. P.* 34; Granaries, resting by weight alone, *Wiltshier v. Cottrell*, 18 E. L. & E. 149; Stables and out-houses, *Dubois v. Kelly*, 10 Barb. 496; Gas fixtures, *Lawrence v. Kemp*, 1 Duer, 363; Beds fastened to the ceiling, *Ex parte Quincy*, 1 Atk. 477; Carding machines, *Walker v. Sherman*, 20 Wend. 636; Taffe *v. Warnick*, 3 Blackf. 111; *Cresson v. Stout*, 17 Johns. 116; *Gale v. Ward*, 14 Mass. 352; *Tobias v. Francis*, 3 Verm. 425; other machinery, *Vanderpoel v. Van Allen*, 10 Barb. 157; *Teaff v. Hewitt*, 1 Ohio State Reps. 511, 541; Cotton spinning machines, screwed to the floor, *Hel-lawell v. Eastwood*, 3 E. L. & E. 562; Chimney-pieces, (ornamental,) *Tindal, C. J.*, in *Grymes v. Boweren*, 6 Bing. 437; Coffee-mills, *Rex v. Londonthorpe*, 6 T. R. 379; Cornices, (ornamental,) *Avery v. Cheslyn*, 3 Ad. & El. 75; Fire-frame, *Gaffield v. Hapgood*, 17 Pick. 192; Furnaces, *Squier v. Mayer*, *Freem. Ch.* 249; Gates, (if removable without injury to the premises,) *Tindal, C. J.*, in *Grymes v. Boweren*, *supra*, *Amos and Ferard on Fixtures*, p. 278; Iron backs to chimneys, *Harvey v. Harvey*, *Str.* 1141; Looking-glasses, *Beck v. Rebow*, 1 P. Wms. 94; Malt-mills, *Lord Kenyon*, in *Rex v. Londonthorpe*, *supra*;

can he be dispossessed by process of law, without that previous notice. In England, this notice, in the case of a tenant from year to year, is one half of a year, which is distinguished from six months notice. (o) In this country there is no uniform rule. In some of the States the English rule seems to have been adopted. (p) In others it is regulated by statute. (q)

*A notice to quit is necessary in all those cases in which the implication of law creates a tenancy from year to year,

Movable boards fitted and used for putting up corn in binns, *Whiting v. Brastow*, 4 Pick. 310; Mills on posts, *Ward's case*, 4 Leon. 241; Ornamental fixtures, *Amos and Ferard on Fixtures*, p. 67; *Beck v. Rebow*, *supra*; Padlock for a corn-house, *Whiting v. Brastow*, *supra*; Pumps slightly attached, *Grymes v. Boweren*, *supra*; Rails and posts, *Fitzherbert v. Shaw*, 1 H. Bl. 258; Stables on rollers, *ib.*; Stoves, *Smith, J.*, in *Gray v. Holdship*, 17 S. & R. 413, *Tindal, C. J.*, in *Grymes v. Boweren*, *supra*, *Greene v. First Parish in Malden*, 10 Pick. 500, 504, *sub fine*; Tapestry, *Harvey v. Harvey*, *supra*; Windmill on posts, *Rex v. Londonthorpe*, *supra*; Window-blinds, *Greene v. First Parish in Malden*, *supra*. — 3. Trade fixtures held to be removable: — Brewing vessels, *Lawton v. Lawton*, 3 Ark. 13; Buildings accessory to removable trade fixtures, *Dudley v. Warde*, *Ambl.* 113; Cider-mills, *Lawton v. Lawton*, *supra*, *Holmes v. Tremper*, 20 Johns. 29; Colliery machines, *Lawton v. Lawton*, *supra*; Coppers, *Pool's case*, 1 Salk. 368, *Lawton v. Lawton*, *supra*; Dutch barns, *Dean v. Allalley*, 3 Esp. 11; Engines, *Lawton v. Lawton*, *supra*; *Dudley v. Warde*, *supra*; Jibs, *Davis v. Jones*, 2 B. & Ald. 165; Salt-pans, *Lawton v. Salmon*, 1 H. Bl. 259, n.; Shrubs planted for sale, *Penton v. Robart*, 2 East, 88, *Miller v. Baker*, 1 Met. 27; Soap works, *Poole's case*, *supra*; Steam engine, *Pemberton v. King*, 2 Dev. (N. C.) 376, *Lemar v. Miles*, 4 Watts, 330; Stills, *Reynolds v. Shuler*, 5 Cow. 323, *Burk v. Baxter*, 3 Missouri, 207; Trees planted for sale, *Penton v. Robart*, *supra*, *Miller v. Baker*, 1 Met. 27; Varnish house, *Penton v. Robart*, *supra*; Vats, *Pool's case*, *supra*.

(o) *Doe d. Williams v. Smith*, 5 Ad. & El. 350; *Johnstone v. Hudlestone*, 4 B. & C. 922. See also *Roe d. Durant*

v. Doe, 6 Bing. 574; *Doe d. Harrop v. Green*, 4 Esp. 198.

(p) *Jackson v. Bryan*, 1 Johns. 322; *Hanchet v. Whitney*, 1 Verm. 311; *Trousdale v. Darnell*, 6 Yerg. 431.

(q) In Massachusetts, three months notice is enough in all cases of tenancy at will, and if the rent be payable at shorter periods, then the notice need only equal one of those periods. Rev. Stat. c. 60, § 26. A question has recently arisen in the Supreme Court of Massachusetts, in the case of *Prescott v. Elms*, 7 Cush. 346, as to the construction of the last part of this provision. It appeared in that case that the defendant was tenant to the plaintiff, and that the rent was payable monthly, but no evidence was offered to show on what day of the month it became due. On the 21st day of September, 1848, the plaintiff gave the defendant notice to quit the premises, and on the 26th day of October following brought his action to recover them. The defendant requested the court to rule that the notice was insufficient, because it ought to appear that the notice covered an entire period intervening between the times of paying rent; so that if the rent was payable on the first day of each month, and notice was given on the 21st of September, the tenant was under no obligation to remove, and the plaintiff could not commence his action until the first day of November. The court declining so to rule, the case was carried to the Supreme Court, where the exception was sustained, on the ground that the Rev. Stat. had in this respect adopted the rule of the common law, as to which, see 13 H. viii. 15, b; *Right v. Darby*, 1 T. R. 159; *Doe d. Shore v. Porter*, 3 T. R. 13; *Richardson v. Langridge*, 4 Taunt. 128; *Doe d. Huddleston v. Johnston*, McCl. & Y. 141. But the English rule applies only where there is a yearly ten-

or one determinable by the landlord. (*r*) But a notice to quit is not necessary where the relation of landlord and tenant does not subsist, (*s*) or where the tenant distinctly *disclaims* the title of his landlord. (*t*)

As the tenant is to act upon the notice when he receives it, it should be such a notice as he may act upon safely; and therefore it must be one which is binding upon all parties concerned at the time it is given, and needs no recognition by any one of them, subsequently; (*u*) nor will such recognition make it sufficient. (*v*) But a notice by one joint tenant for himself and the others is sufficient; (*vv*) and so is a notice by one copartner for the firm. (*ww*)

No particular form of the notice is necessary; but there must be a reasonable certainty in the description of the premises, and in the statement of the time when the tenant must quit. And it may be oral, unless there be an express agreement that it should be in writing. (*w*) It should be served upon the tenant, personally, or by leaving it with the

ancy expressly or impliedly created, and there is no agreement between the parties in relation to the termination of the tenancy; but where the parties agree that the tenancy shall expire upon the giving of a notice for a certain time, the notice may be given at any time. *Doe d. King v. Grafton*, 11 E. L. & E. 488. See, however, *Baker v. Adams*, 5 Cush. 99, and also *Doe v. Cox*, 11 Q. B. 122; *Post v. Post*, 14 Barb. 253. In Massachusetts a tenant at sufferance is not entitled to notice. *Benedict v. Morse*, 10 Met. 223; *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 Met. 350. See also *Ellis v. Paige*, 1 Pick. 43; *Coffin v. Lunt*, 2 Pick. 70.

(*r*) *Doe d. Martin v. Watts*, 2 Esp. 501, 7 T. R. 83; *Denn d. Brune v. Rawlins*, 10 East, (Day's ed.) 261, n. 2.

(*s*) *Right v. Bawden*, 3 East, 260; *Roe d. Brune v. Pridaux*, 10 East, 158. Therefore, if a man gets into possession of a house to be let, without the privity of the landlord, and they afterwards enter into a negotiation for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without giving any notice to quit. *Doe d. Knight v. Quigley*, 2

Camp. 505. So a member of a firm, occupying a house of one of his copartners during the partnership, is not entitled to notice at its close. *Waithman v. Miles*, 1 Stark. 181. So of a vendee in possession, who has not paid the price, nor been recognized as a tenant. *Doe d. Moore v. Lawder*, 1 Stark. 308; *Doe d. Leeson v. Sayer*, 3 Camp. 8. See also *Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14.

(*t*) *Doe d. Davies v. Evans*, 9 M. & W. 48; *Doe d. Williams v. Pasquali*, Peake, 196; *Bower v. Major*, 1 B. & B. 4; *Doe d. Calvert v. Frowd*, 4 Bing. 557; *Doe d. Phillips v. Rollings*, 4 C. B. 188; *Doe v. Clarke*, Peake's Add. Cas. 239.

(*u*) *Doe d. Fisher v. Cuthell*, 5 East, 491; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

(*v*) *Parke*, B., in *Buron v. Denman*, 2 Exch. 167, 188; *Doe d. Lyster v. Goldwin*, *supra*; *Doe d. Mann v. Walters*, 10 B. & C. 626.

(*vv*) *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135; *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

(*ww*) *Doe d. Elliott v. Hulme*, 2 M. & Ry. 483.

(*w*) *Doe d. Macartney v. Crick*, 5

tenant's wife, or servant, at the usual place of abode of the tenant; (x) and if so left it is sufficient, although it never *reach the tenant. (y) If there be more than one tenant, the notice should be addressed to all, but it may be served on either one. (z)

A valid notice, properly served, vests the premises in the landlord, and absolutely terminates the tenant's right of possession, at the time stated. (a) But this and all other effect of the notice may be waived by the landlord, and is so waived by his receiving subsequent rent from the tenant. (aa)

Esp. 196; Doe *d.* Dean and Chapter of Rochester *v.* Pierce, 2 Camp. 96; Legg *d.* Scot *v.* Benion, Willes, 43.

(x) Jones *d.* Griffiths *v.* Marsh, 4 T. R. 404; Doe *d.* Buross *v.* Lucas, 5 Esp. 183.

(y) Doe *d.* Neville *v.* Dunbar, M. & Malk. 10.

(z) Doe *d.* Bradford *v.* Watkins, 7 East, 551; Doe *d.* Macartney *v.* Crick, 5 Esp. 196.

(a) Turner *v.* Meymott, 1 Bing. 158; Taunton *v.* Costar, 7 T. R. 431; Lacey

v. Lear, Peake's Add. Cas. 210. Whether a tenant in possession, who, after a good notice has expired, has been assaulted and forcibly expelled from the premises, may have his action against the landlord, seems to be doubtful. See Newton *v.* Harland, 1 M. & G. 644; Harvey *v.* Brydges, 14 M. & W. 437; Wright *v.* Burroughes, 3 C. B. 685.

(aa) Collins *v.* Canty, 6 Cush. 415; Blythe *v.* Dennett, 6 E. L. & E. 424. See also Hunter *v.* Osterhondt, 11 Barb. 33.

CHAPTER IV.

SALE OF PERSONAL PROPERTY.

Sect. I.—*Essentials of a Sale.*

ALL that is essential to the sale of a chattel, at common law, is the agreement of the parties that the property in the subject-matter should pass from the vendor to the vendee for a consideration given, or promised to be given, by the vendee. Yet where the parties have not explicitly manifested their meaning, the law makes some important inferences. There is a presumption that every sale is to be consummated at once; that the chattel is to be delivered, and the price paid, without delay. If, therefore, nothing appears but an offer and an acceptance, and the vendee goes his way without making payment, it is held to be a breach of the contract, (which is presumed to have contemplated payment on the spot,) and the vendor is not bound by the sale. But if there was a delivery of the chattel, or the receipt of earnest, or of part payment, either of these is evidence of an understanding that something should remain to be performed *in futuro*; and the legal presumption is rebutted. Where the terms of the contract expressly postpone delivery, or payment, or both, to a future day, here also the sale is valid, and no legal presumption obstructs the intention of the parties, but the property in the chattel sold passes immediately. In this case no earnest is necessary to bind the bargain. (b) The effect of the statute of frauds, in

(b) The law of sales, as it stands at this moment at the common law is at least as old as the year books. In 14 H. 8, 17, b, 21, b, in the Common Pleas, the law upon this subject is thus stated by Pollard, J.:—"Bargains and sales all depend upon communication and words between the parties; for all bar-

gains can be to take effect instantly, or upon a thing to be done thereafter. They can be upon condition, and they can also be perfect; and yet no *quid pro quo* immediately. And all this depends upon the communication between you and me: as that I shall have £20 for my horse, and I agree; now if you do not pay the

modifying the principles of the common law in relation to sales, will be considered hereafter. We will now proceed to treat of an absolute sale, and then of a conditional sale of a chattel.

SECTION II.

ABSOLUTE SALE OF CHATTELS.

A sale of a chattel is an exchange thereof for money; but a sale is distinctly discriminated in many respects from an exchange, in law; an exchange being the giving of one thing and the receiving of another thing; while a sale is the giving of one thing for that which is the representative of all things. (c)

money immediately, this is not a bargain; for my agreement is for the £20, and if you do not pay the money straightway you do not act according to my agreement. I ought, however, in this case, to wait convenient leisure, to wit, until you have counted your money. But if you go to your house for the money, am I obliged to wait? No, truly; for I would be in no certainty of my money or of your return; and therefore it is no contract unless this [delay] be agreed at the communication. But if I sell my horse to you for so much as J. at S. shall say, this is good if he does say, and if not, void; and thus a contract can be good or void, depending upon matter subsequent. Likewise if I sell my horse for £10 to be paid on a day, now this is good; and yet there is no *quid pro quo* immediately." In the same case *Brudnel, C. J.*, said:—"As has been said, bargains and sales are as is concluded and agreed between the parties—as their intentions can be gathered. For if I sell my horse to you for £10, and we both are agreed, and I accept a penny *in earnest*, this is a perfect contract; you shall have the horse, and I shall have an action for the money. But if I wish to sell my horse to you for £10, and you say that you will give £10 for him, and I say that I am content; still, if you do not pay the money now, but depart from the place, this is no bargain, for I

am only content that you should have my horse for £10, and notwithstanding you say you are content, the transaction is yet not perfect; for you do not pay the money, and so do not perform the agreement." See also *Shep. Touch. p. 224*. And also *Noy's Maxims, p. 88*.

(c) The distinction between sales and exchanges is well pointed out in an anonymous case in 3 *Salk. 157*, where it is said:—"Permutatio vicina est emptioni, but exchanges were the original and natural way of commerce, precedent to buying, for there was no buying till money was invented; now, in exchanging, both parties are buyers and sellers, and both equally warrant; and as this is a *natural* rather than a *civil contract*, so by the *civil law*, upon a bare agreement to exchange, without a delivery on both sides, neither of the parties could have an action upon such agreement, as they may in cases of selling; but if there was a delivery on one side, and not of the other, in such case the deliverer might have an action to recover the thing which he delivered, but he could have no action to enforce the other to deliver what he agreed to deliver, and which the deliverer was to have *in lieu* of that thing which he delivered to the other."—If goods have been delivered by one party, and the other party agrees to deliver other goods of a similar quality on demand, the transaction is not a sale, but an

For a sale to be valid in law, there must be parties, a consideration, and a thing to be sold. All persons may be parties to a sale, unless they labor under the disabilities or restraints which have been spoken of in reference to contracts generally.

Of the consideration we have spoken already.

The existence of the thing to be sold, or the subject-matter of the contract, is essential to the validity of the contract. (d) If a horse sold be dead before the sale, or merchandise be destroyed by fire, both parties being ignorant thereof, the sale is wholly void. If a substantial part of the thing sold be non-existent, it is said (e) that the buyer has his option to rescind the sale, or take the remainder with a reasonable abatement of the price. But where the parties are equally innocent, we think the meaning and effect of this rule is that

agreement to exchange. *Mitchell v. Gile*, 12 New Hamp. 390.—And proof of an exchange will not support an averment of a sale of goods. *Vail v. Strong*, 10 Verm. 457.—But in *Sheldon v. Cox*, 3 B. & C. 420, where A. agreed to give a horse, warranted sound, in exchange for a horse of B., and a sum of money; and the horses were exchanged, but B. refused to pay the money, pretending that A.'s horse was unsound; it was held that it might be recovered on an *indebitatus* count for horses sold and delivered.

(d) *Wood & Foster's case*, 1 Leon. 42; *Grantham v. Hawley*, Hob. 132; *Strickland v. Turner*, 14 E. L. & E. 471; *Robinson v. Macdonnell*, 5 M. & S. 228, where it was held that an assignment of the freight, earnings, and profits of a ship does not extend to the profits not in existence, actual or potential, at the time of the assignment. Therefore, where C. assigned by deed to S. the freight, earnings, and profits of the ship W., which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the said voyage; it was held, that this oil did not pass to S. by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, and the voyage was not then contemplated. But where the plaintiffs had shipped corn to London in a vessel chartered by them, and sent

the bill of lading together with the policy of insurance effected upon the property, to the defendants, cornfactors in London, who were to act under a *del credere* commission, and the defendants on the 15th of May sold the cargo to C. sending him a bought note, stating that he had bought of them 1180 quarters of Salonica Indian corn, of fair average quality when shipped on board The *Kezia Page* from Salonica, bill of lading dated February 22: at 27s. per quarter, free on board and including freight and insurance to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders, payment to be upon handing shipping documents; it was held (*Pollock*, C. B. dissenting) that the meaning of the contract was that the purchaser bought the cargo if it existed at the date of the contract, but that if damaged or lost he bought the benefit of the insurance, and therefore although upon the voyage the corn had become fermented and so heated that it was unfit to be carried, and was sold on the 24th April at Tanis Bay, he was bound to pay the stipulated price in a reasonable time after the delivery of the shipping documents, and that therefore the defendants were liable to the plaintiff, under their *del credere* commission. *Couturier v. Hastie*, 16 E. L. & E. 562.

(e) 2 Kent's Com. Lec. 39, p. 469.—The same rule obtains in the French Law. Code Napoleon, No. 1601.

the buyer should have only his choice between enforcing or rescinding the contract as to the remainder. That is, he may take the remainder, if he will pay the price of the whole, or will pay it with an abatement which can be made exact by a mere numerical proportion; as where the goods were all of one quality, and a certain part was wholly destroyed, and the residue left wholly uninjured. But if a new price is to be made for the remainder, by a new estimate of its value, this can be done only by mutual consent. (f)

*A mere contingent possibility, not coupled with an interest, is no subject of sale; as all the wool one shall ever have; (g) or the sheep which a lessee has covenanted to leave at the end of an existing term. If rights are vested, or possibilities are distinctly connected with interest or property, they may be sold. (h) But if one sells what he has not now, and has made no contract for purchasing, and has no definite right to expect, as by consignment, but intends to go into the market and buy, it has been held that he cannot enforce this contract; (i) and although this is questioned, such a contract

(f) See also *Farrer v. Nightingal*, 2 Esp. 639, where Lord *Kenyon* said:—"I have often ruled that where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end, and bring an action for money had and received to recover back any sum of money he may have paid in part performance of the agreement for the sale; and though it is said here, that upon the mistake being discovered in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case; it is sufficient for the plaintiff to say, that is not the interest which I agreed to purchase."

(g) See *Grantham v. Hawley*, Hob. 132. See *Langton v. Horton*; 1 Hare, 556. But a valid sale may be made of the wine that a vineyard is expected to produce; or the grain that a field is expected to grow; or the milk that a cow may yield during the coming year, or the future young born of a female ani-

mal then owned by the vendor, (*McCarthy v. Blevins*, 5 Yerg. 195,) or the wool that shall hereafter grow upon his sheep. But see *Screws v. Roach*, 22 Ala. 675.

(h) See *Jones v. Roe*, 3 T. R. 88.—But the expectancy of an heir presumptive, or apparent, (the fee simple being in the ancestor,) is not an interest or a possibility capable of being the subject of a contract. *Carleton v. Leighton*, 3 Mer. 667.

(i) *Bryan v. Lewis, Ry. & Mood*, 386. And see *Lorymer v. Smith*, 1 B. & C. 1, 2 D. & R. 23, *Abbott, C. J.* But this doctrine was directly overruled in the late case of *Hibblewhite v. McMorine*, 5 M. & W. 462, where *Parke, B.*, in delivering the judgment of the court, is reported to have said:—"I have always entertained considerable doubt and suspicion as to the correctness of Lord *Tenterden's* doctrine in *Bryan v. Lewis*; it excited a good deal of surprise in my mind at the time; and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable ex-

if enforceable, as by the later authority and the better reason it seems to be, must certainly be regarded as a contract for a future sale, and not as a present contract of sale; and therefore the property in the thing when it is acquired by the proposed vendor, does not pass at once to the proposed vendee until the actual sale be made. (ii)

A sale may be good in part, and void as to the residue; * good as between the parties, but void as to creditors; good as to some of the creditors, but void as to others. (j)

SECTION III.

PRICE, AND AGREEMENT OF PARTIES.

The price to be paid must be certain, or so referred to a definite standard that it may be made certain;—(k) as what

pectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties. The *dictum* of Lord Tenterden certainly was not a hasty observation thrown out by him, because it appears from the case of *Lorymer v. Smith* that he had entertained and expressed similar notions four years before. He did not, indeed, in that case, say that such a contract was void, but only that it was of a kind not to be encouraged; and the strong opinion he afterwards expressed appears to have gradually formed in his mind during the interval, and was no doubt confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time. There is no indication in any of the books of such a doctrine having ever been promulgated from the bench, until the case of *Lorymer v. Smith*, in the year 1822; and there is no case which has been since decided on that authority. Not only, then, was the doubt expressed by *Bosanquet, J.*, in *Wells v. Porter*, well founded, but the doctrine is clearly contrary to law." See also *Wells v.*

Porter, 2 Bing. N. C. 722, *Bosanquet, J.*; *Mortimer v. McCallan*, 6 M. & W. 58; *Stanton v. Small*, 3 Sandf. 230.

(ii) *Black v. Webb*, 20 Ohio, 304; *Stanton v. Small*, 3 Sandf. 230; *Lunn v. Thornton*, 1 Com. Bench, 385.

(j) *Bradford v. Tappan*, 11 Pick. 76, 79.

(k) *Brown v. Bellows*, 4 Pick. 189, where the price was fixed by referees, and the court said in giving judgment: "It is objected that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees; and we are referred to Inst. 3, 24, pr. where it is said:—'*Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest.*' But we apply another rule—*id certum est, quod certum reddi potest.* It was indeed formerly doubted whether, when a thing was to be sold, at whatever price Titius should value it, such contract would be good; but by Inst. 3, 24, 1, it is decided that it would be, '*sed nostra decisio ita hoc constituit, ut quoties sic composita sit venditio, quanti ille aestimaverit, sub hac conditione staret contractus, ut siquidem ille, qui nominatus est, pretium definierit, tunc omnimodo secundum ejus aestimationem et pretium* } persolvatur, et res tradatur, et venditio ad effectum perducatur.'" So it is said in *Ayliffe's Civ. Law*, B. 4, tit.

another man has given; or what another man shall say should be the price; but if this third party refuse to fix the price, the sale is void. (*l*) And the thing sold must be specific, and capable of certain identification. There must be an agreement of mind as to this; and if there be an honest error as to the price, or as to the substantial and essential qualities of the thing sold, (not as to its mere worth or condition,) the sale may be treated as null. (*m*) This agreement of mind may be expressed orally or by letter; and in the latter case, the contract is complete when a distinct proposition made by letter is accepted by a letter mailed or otherwise sent by the party receiving the offer, *bonâ fide*, within a reasonable time, and before he receives information of a withdrawal of the offer. But we have already considered these questions fully, when treating of assent; and we would refer in this connection to what we there said. (*n*)

SECTION IV.

THE EFFECT OF A SALE.

Upon a completed sale the property in the thing sold passes to the purchaser; one of these things implies the other; if the property passes then it is a completed sale; and

4 :—'The price agreed on between the parties ought to be certain; wherefore a purchase is not valid if it depends on the will of the buyer or seller; though such price may be well enough referred to the arbitration of a third person to adjudge and determine the value of the thing sold.' 'And thus the certainty of a price may be had, either by the determination of the contracting parties themselves, or else by relation had to some person or thing.' In the case at bar, the referees have fixed the price, and according to these authorities, and the reason of the thing, the sale should be carried into effect, unless for some other objection which has been made by the counsel for the defendant, it should be differently determined." See also *Flagg v. Mann*, 2 Sumner, 539.

(*l*) Story on Sales, § 220. A sale

may be made of an article for what it is worth, for that can be ascertained by experts. See *Hoodly v. McLaine*, 10 Bing. 487; *Acebal v. Levy*, Ib. 382. See also *Dickson v. Jordan*, 12 Ire. L. 79.

(*m*) See *Kelly v. Solari*, 9 M. & W. 54; *Lucas v. Worswick*, 1 M. & Rob. 293.

(*n*) See *ante*, p. 403, *et seq.* See also *Routledge v. Grant*, 4 Bing. 653; *Bean v. Burbank*, 16 Maine, 458. Where a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State, and if it is valid by the laws of the latter State, it will be enforced in the State whence the letter is sent, although it would have been invalid if made there. *McIntyre v. Parks*, 3 Met. 207.

if a completed sale then the property passes. (*o*) If it be sold for cash, and the price be not paid, or if it be sold on a credit, but by the terms of the bargain is to remain in the hands of the vendor, the vendor has a lien on it for the price; (*p*) and only payment or tender gives the vendee a right to possession. And if it be sold on credit, and the buyer by the terms of the bargain has the right of immediate possession without payment, but the thing sold actually remains in the possession of the seller until the credit has expired, and the price is still unpaid, it seems that the seller then has a lien for the price. (*pp*) If the property passes, though not the right of possession, and the thing sold perish, the loss falls on the purchaser. (*q*) His lien is destroyed by a delivery of the goods, or by a delivery of a part, without intention to separate it from the rest, but with an intention thereby to give possession of the whole. (*r*) If sold *for cash, and the money be not paid within a reasonable time, the vendor

(*o*) *Bayley, J.*, in *Simmons v. Swift*, 5 B. & C. 862; *Dixon v. Yates*, 2 Nev. & Mann. 202, *Parke, J.*; *Atkin v. Barwick*, 1 Strange, 167, where *Fortescue, J.*, says:—"Property by our law may be divested without an actual delivery; as a horse in a stable." It is exactly otherwise in the Roman civil law, and the laws of those nations in Europe which adopt the civil law as the basis of their law. The property (*dominium*) does not pass until delivery. Thus, if a seller retains the thing sold, to be delivered a week hence, and in the mean time becomes insolvent, the buyer does not hold the thing, but it goes with his assets to the assignees. All the buyer holds is a claim against the seller for the value of the thing, and for this debt of the seller the buyer takes only his dividend like other creditors; for by a sale only, without delivery, the buyer acquires only a *jus ad rem* and not a *jus in re*. See 1 Bell's Commentaries, 166, *et seq.* But for the common law rule, see cases cited in next note; also Noy's Maxims, p. 88; *Hinde v. Whitehouse*, 7 East, 558, *Lord Ellenborough*; *Com. Dig. Agreement, B. 3*; *Tarling v. Baxter*, 6 B. & C. 362.—See, however, *Bayley v. Culverwell*, 2 M. & Ry. 566, note; *Langfort v. Tyler*, 1 Salk. 113.

(*p*) *Bloxam v. Sanders*, 4 B. & C. 948; *Cornwall v. Haight*, 8 Barb. 328; *Bowen v. Burk*, 13 Penn. 146. See also *Dixon v. Yates*, 5 B. & Ad. 313; *Withers v. Lyss*, 4 Camp. 237; *Bush v. Davies*, 2 M. & S. 397; *Langfort v. Tyler*, 1 Salk. 113.

(*pp*) *New v. Swain*, *Danson & Lloyd's Mercantile Cases*, 193.

(*q*) *Tarling v. Baxter*, 6 B. & C. 362. See also *Willis v. Willis*, 6 Dana, 48; *Macomber v. Parker*, 13 Pick. 183; *Farnum v. Perry*, 4 Law Reporter, 276; *Crawford v. Smith*, 7 Dana, 61.

(*r*) Mere delivery of part will not, however, divest the vendor of his lien, as to the *whole*, if any thing remains to be done by the vendor to the part undelivered. *Simmons v. Swift*, 5 B. & C. 857. See on this subject *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 4 B. & P. 69; *Hanson v. Meyer*, 6 East, 614; *Ward v. Shaw*, 7 Wend. 404; *Payne v. Shadbolt*, 1 Camp. 427; *Brewer v. Salisbury*, 9 Barb. 511. Of course if the vendee obtains possession by fraud he can derive no rights, and the vendor can lose none by such a delivery. *Earl of Bristol v. Willsmore*, 1 B. & C. 514. See also *Hussey v. Thornton*, 4 Mass. 405.

may treat the sale as null. (s) There may, however, be a delay in the payment justified by the terms or the nature of the contract.

The property does not pass absolutely unless the sale be completed; and it is not completed until the happening of any event expressly provided for, or so long as any thing remains to be done to the thing sold, to put it into a condition for sale, or to identify it, or discriminate it from other things, or to determine its quantity, if the price depends on this; unless this is to be done by the buyer alone. (t)

An agreement to sell is a different thing from a sale, and therefore no mere promise to sell hereafter, amounts to a present sale; so, an acceptance of a specific order for certain chattels is not itself a sale of those chattels either to the drawer or to the party in whose favor the order is drawn. (tt) And it is always a question of fact for the jury, whether a sale has been completed or not. (u)

(s) Anonymous, Dyer, 30, a. See also Langfort v. Tiler, 1 Salk. 113. But see Greaves v. Ashlin, 3 Camp. 426, *contrà*. See also Blackburn on Contract of Sale, p. 328, *et seq*.

(t) Tarling v. Baxter, 6 B. & C. 360; Gillett v. Hill, 2 C. & M. 535; Zagury v. Furnell, 2 Camp. 240; Wallace v. Breeds, 13 East, 522; Busk v. Davis, 2 M. & S. 397; Shepley v. Davis, 5 Taunt. 617; Rhode v. Thuaites, 6 B. & C. 388; Alexander v. Gardner, 1 Bing. N. C. 676. But where the thing to be done by the vendor is but trifling, or is but a mathematical computation, this rule will not apply. Thus, where there was a sale of certain trees, at a fixed price per cubic foot, and the trees had been all marked, and the cubical contents of each tree ascertained, it was held that the property passed to the purchaser, although the sum total of the cubical contents had not been ascertained. Tansley v. Turner, 2 Bing. N. C. 151, 2 Scott, 238. The general principle stated in the text is recognized in the following American cases. Dixon v. Meyers, 7 Grattan, 240; Ward v. Shaw,

7 Wend. 404; McDonald v. Hewett, 15 Johns. 349; Barrett v. Goddard, 3 Mason, 112; Rapelye v. Mackie, 6 Cowen, 250; Russell v. Nicoll, 3 Wend. 112; Outwater v. Dodge, 7 Cowen, 85; Stevens v. Eno, 10 Barb. 95; Damon v. Osborn, 1 Pick. 476; Macomber v. Parker, 13 Pick. 175; Houdlette v. Tallman, 14 Maine, 400; Cushman v. Holyoke, 34 Maine, 289; Stone v. Peacock, 35 Maine, 385; Golder v. Ogden, 15 Penn. 528; Lester v. McDowell, 18 Penn. 91; Riddle v. Varnum, 20 Pick. 280; Davis v. Hill, 3 N. Hamp. 382; Messer v. Woodman, 2 Foster, 172; Warren v. Buckminster, 4 Foster, 337; Crawford v. Smith, 7 Dana, 61.—But it is held, that if the parties intended that the sale should be complete before the article sold is weighed or measured, the property will pass, before this is done. Riddle v. Varnum, 20 Pick. 280. See also Butterworth v. McKinly, 11 Humph. 206. But see Waldo v. Belcher, 11 Ire. L. 609.

(tt) Burrall v. Jacob, 1 Barb. 165.

(u) DeRidder v. McKnight, 13 Johns. 294.

SECTION V.

OF POSSESSION AND DELIVERY.

While as between the parties, the property passes by a sale, without delivery, it is not valid, in general, as against a third party without notice, without delivery. For if the same thing be sold by the vendor to two parties by conveyances equally valid, he who first gets possession will hold it. (*uu*) In general, where there is a completed sale, and no change of possession, this retaining of possession by the vendor is a badge of fraud, and will avoid the sale in favor of a party who subsequently acquires title to the property in good faith, and with no knowledge of the sale. In the days of Mansfield and Buller, possession retained by the seller or mortgagor of chattels gave rise to an *inference of law*, of fraud. This severe doctrine has certainly been held in many cases down to the present day, both in England and in this country. But the rule has been much modified in other cases. And there seems now to be a tendency to consider the question of fraud in all such cases as a question of fact, in relation to which the circumstance of possession is of great weight, though not absolutely conclusive. The question is thus taken from the court who should infer it from a single fact, and is left to the jury, who may consider all the facts, and determine how far the fact of possession is explained, and made consistent with an honest purpose. (*v*)

(*uu*) 2 Kent's Com. 522; *Dawes v. Cope*, 4 Binn. 258; *Babb v. Clemson*, 10 S. & R. 419; *Fletcher v. Howard*, 2 Aikens, 115.

(*v*) Although few questions in the law present a greater conflict of authorities than this, we believe that reason, analogy, and the current of modern authority, both English and American, support the principle laid down in the text. The subject is ably examined in 2 Kent's Com. 515, *et seq.*; and Smith's *Leading Cases*, (4th Am. ed.) vol. 1, p. 1, *et seq.* The following authorities adopt the view of the text. Cadogan

v. Kennett, Cowp. 432; *Eastwood v. Brown, Ry. & Mood*, 312; *Kidd v. Rawlinson*, 2 B. & P. 59; *Cole v. Davies*, 1 Lord Raym. 724; *Lady Arundell v. Phipps*, 10 Ves. 145; *Watkins v. Birch*, 4 Taunt. 823; *Latimer v. Batson*, 4 B. & C. 652; *Steward v. Lombe*, 1 Brod. & Bing. 506; *Wooderman v. Baldock*, 8 Taunt. 676; *Hoffman v. Pitt*, 5 Esp. 22; *Armstrong v. Baldock*, Gow, 33; *Storer v. Hunter*, 3 B. & C. 368; *Land v. Jeffries*, 5 Rand. 211; *Terry v. Belcher*, 1 Bailey, 568; *Howard v. Williams*, Id. 575; *Smith v. Henry*, 2 Id. 118; *Callen v. Thompson*, 3 Yerg. 475; *Ma-*

The delivery may be symbolical, or of a part for the whole; (*vv*) and a delivery of the key, the property being locked up, is so far a delivery of the goods, that it will support an action of trespass against a subsequent purchaser who gets possession of them. (*v*) Marking timber on a wharf, or goods in a warehouse, operates as a delivery; goods bought in a shop, weighed or measured, and separated, and left by the owner until called for, are sufficiently delivered; (*x*) and horses bought at livery, and remaining at livery with the seller at his request, are said to be delivered to the buyer. (*y*) This last case has been questioned, but it

ney *v.* Killough, 7 Id. 440; Mitchell *v.* Beal, 8 Id. 142; Baylor *v.* Smithers, 1 Litt. 112; Goldsbury *v.* May, Id. 256; Hundley *v.* Webb, 3 J. J. Marsh. 643; Walsh *v.* Medley, 1 Dana, 269; Bissell *v.* Hopkins, 3 Cow. 166; Thompson *v.* Blanchard, 4 Coms. 303; Griswold *v.* Sheldon, Id. 580; Brooks *v.* Powers, 15 Mass. 244; Bartlett *v.* Williams, 1 Pick. 288; Homes *v.* Crane, 2 Id. 607; Wheeler *v.* Train, 3 Id. 255; Adams *v.* Wheeler, 10 Id. 199; Marden *v.* Babcock, 2 Met. 99; Haven *v.* Low, 2 New Hamp. 13; Kendall *v.* Fitts, 2 Foster, 1; Walcott *v.* Keith, Id. 198; Coburn *v.* Pickering, 3 Id. 415; Clark *v.* Morse, 10 Id. 239; Reed *v.* Jewett, 5 Greenl. 96; Cutter *v.* Copeland, 18 Maine, 127; Comstock *v.* Rayford, 12 S. & M. 369; Field *v.* Simco, 2 Eng. [Ark.] 269; Erwin *v.* Bank of Kentucky, 5 Louis. Ann. 1; Collins *v.* Pellerin, 5 Louis. Ann. 99; Bryant *v.* Kelton, 1 Tex. 415. —It must be confessed, however, that there is a host of decisions in support of the opposite principle, and that it still has the sanction of very sound, respectable, and learned courts. The doctrine was first laid down in Twyne's case, 3 Coke, 87, and has since been recognized or adopted in the following among other cases. Edwards *v.* Harben, 2 T. R. 587; Paget *v.* Perchard, 1 Esp. 205; Wordell *v.* Smith, 1 Camp. 332; Reed *v.* Willmott, 5 M. & P. 553; Hamilton *v.* Russell, 1 Cranch, 309; Alexander *v.* Deneale, 2 Munf. 341; Robertson *v.* Ewell, 3 Id. 1; Kennedy *v.* Ross, 2 Rep. Con. Ct. 125; Hudnal *v.* Wilder, 4 McCord, 294; Ragan *v.* Kennedy, 1 Overt. 91; Brummel *v.* Stockton, 3 Dana, 134; Laughlin *v.* Fer-

guson, 6 Id. 117; Young *v.* McClure, 2 W. & S. 147; Brady *v.* Haines, 18 Penn. 113; Bowman *v.* Herring, 4 Harring. 458; McBride *v.* McClelland, 6 Id. 94; Thornton *v.* Davenport, 1 Scammon, 296; Chumar *v.* Wood, 1 Halst. 155; Patton *v.* Smith, 5 Conn. Rep. 196; Weeks *v.* Wead, 2 Aikens, 64; Beattie *v.* Robin, 2 Verm. 181; Farnsworth *v.* Shepard, 6 Verm. 521; Wilson *v.* Hooper, 12 Verm. 653; Hutchins *v.* Gilchrist, 23 Verm. 82; Gibson *v.* Love, 4 Flor. 217; Sturtevant *v.* Ballard, 9 Johns. 337. —But in those courts where the doctrine of Twyne's case has been received with favor, the rule has not been applied to sales on execution, which are in their nature public and notorious. Simer-son *v.* Branch Bank, 12 Ala. 205; Garland *v.* Chambers, 11 Sm. & Marsh. 337; Foster *v.* Pugh, 12 Id. 416; Abney *v.* Kingsland, 10 Ala. 355.

(*vv*) See Chamberlain *v.* Farr, 23 Verm. 265; Brewer *v.* Salisbury, 9 Barb. 511.

(*w*) Chappel *v.* Marvin, 2 Aikens, 79.

(*x*) So selecting and marking sheep, then in the possession of one who was requested by the vendee to retain possession of them for him, is a sufficient delivery. Barney *v.* Brown, 2 Verm. 374.

(*y*) Elmore *v.* Stone, 1 Taunt. 458. But see the subsequent case of Carter *v.* Toussaint, 5 B. & Ald. 855. In that case, a horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for twenty days without any charge to the vendee.

seems to come under the general analogy, for the purchaser incurs at once a liability for their keeping. It is true, however, that later cases apply a stricter rule than formerly to constructive delivery; and the presumption of delivery is not to be favored, because it deprives the seller of his lien without payment. (z) But if goods are sent, even under a contract of sale, to be applied by the receiver (who was to be the buyer,) to a particular purpose, (as *to take up certain bills of exchange,) to which purpose they were not and could not be applied, the sender does not lose his property in them by the delivery, but may recover them back. (a) And if property be awarded to one by arbitrators, at a certain price, the tender of the price does not pass the property, unless the other party accept the price. (b)

It is sometimes a question of interest what is the duty of the seller as to delivery of the articles sold, and as to keeping them until delivery; and also what is the duty of the vendee as to receiving them. Usage determines this in a considerable degree; but from the general usage and the adjudications some rules may be deduced.

If no time be appointed for delivery, or for payment, these acts must be done within a reasonable time; and if neither party does any thing within that period, the contract is deemed to be dissolved. (c) If the goods are to be delivered when requested, the purchaser may sue for non-delivery without proving a request, provided the seller have incapaci-

At the expiration of that time, the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors. Upon these facts the courts held that there was no acceptance of the horse by the vendee within the statute of frauds. Although *Elmore v. Stone* has been much doubted, it seems not to have been expressly overruled. See *Smith v. Surman*, 9 B. & C. 570, *Bayley, J.*

(z) *Dole v. Stimpson*, 21 Pick. 384. See also *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Baldev v. Parker*, 2 B. & C. 37. But these cases arose under the statute of frauds, and turned upon what was a sufficient acceptance within that act. But there may be, perhaps, a de-

livery good at common law, which would not amount to an acceptance within the statute of frauds.

(a) *Moore v. Barthop*, 1 B. & C. 5; *Thompson v. Tiles*, 2 B. & C. 422; *Giles v. Perkins*, 9 East, 12; *Bent v. Puller*, 5 T. R. 294; *Zineck v. Walker*, 2 W. Bl. 1154; *Parke v. Eliason*, 1 East, 544.

(b) *Hunter v. Rice*, 15 East, 100. And Lord *Ellenborough* said:—"There is a difference between property awarded to be transferred by the owner to another, and that which is actually transferred by the contract of the owner through the medium of his agent."

(c) *Langfort v. Tiler*, 1 Salk. 113. And see *Lanyon v. Toogood*, 13 M. &

tated himself from delivering them, as by resale or the like, (*d*) but in general a request must be made before the seller can be sued for non-delivery. (*dd*) And if the vendee, either by the express terms of the contract or from its nature, is to designate the manner or place of delivery, he must do this before he can maintain his action. (*e*) If a day be fixed either for delivery or payment, the party has the whole of it; and if any one of several days, the whole of all of them. It is said he must endeavor to do the needful act at a convenient hour before midnight; early enough, for instance, for the other party to count the money, or examine the goods, and give a receipt; but this very general rule does not seem anywhere defined. If on a certain day, at a certain place, then it must be done at a convenient time before sunset, because the presence of the other party is necessary *and the law does not require him to be there through the twenty-four hours. (*ee*)

The seller is to keep the thing sold until the time for delivery, with ordinary care, and is liable for the want of that care, or of good faith; but if he does so keep it, he is not liable for its loss, (*ef*) unless it perish through a defect against which he has warranted. If the parties are distant from each other, the seller must follow the directions of the buyer as to the way of sending the thing sold to him, and then a loss in the transportation will fall on the buyer, (*f*) unless attributa-

W. 27; *Fletcher v. Cole*, 23 Verm. 114.

(*d*) *Bowdell v. Parsons*, 10 East, 359; *Amory v. Brodrick*, 5 B. & Ald. 712.

(*dd*) *Bach v. Owen*, 5 T. R. 409. See *Radford v. Smith*, 3 M. & W. 254; *Benners v. Howard*, 1 Taylor, 149.—As to a demand by a servant, see *Squier v. Hunt*, 3 Price, 68.

(*e*) See *West v. Newton*, 1 Duer, 277; *Armitage v. Insole*, 14 Q. B. 728.

(*ee*) See *Startup v. McDonald*, 2 M. & Gr. 395.

(*ef*) Where A. bought of B. three hundred barrels of rosin "to be delivered when called for within a week," and paid for the same, and within a week B. manufactured more than that quantity, which he had ready for delivery, but did not set apart any specific quantity for A.,

the rosin being destroyed by fire after the end of the week, it was held that A. was bound to call during the week; that B. was not bound to set apart for A. any specific three hundred barrels, and that A. having failed to perform his part of the contract, could not recover against B. either upon the contract to deliver or for money had and received, to recover the purchase-money paid. *Willard v. Perkins*, 1 Busbee's Law R. (N. C.) 253.

(*f*) *Vale v. Bayle*, Cowp. 294. In *Godfrey v. Furzo*, 3 P. Wms. 186, and in *Vale v. Bayle*, *supra*, Lord Chief Justice *Eyre* is said to have held, "That though a trader in the country does not appoint a carrier, yet if the goods be embezzled he shall be liable, because he leaves it in the breast of the person

ble to the negligence of the seller; if the seller disregards such orders, the loss in transportation falls on him, though it do not happen through his neglect. If the directions be general, as, "by a carrier," without naming any one, usual and proper precautions must be taken, and will protect the seller. (g) And it is a part of his duty to give such notice of the sending them by ship or otherwise as will enable the buyer to insure or take other precautions. (h) If the contract be to deliver the thing ordered at the residence or place of business of the buyer, the seller is liable, although such delivery becomes impossible, unless it becomes so through the act of the buyer. (i) If the seller refuse to deliver it at a *time and place agreed on, and it perish afterwards without his fault, he is liable for it. But if he be ready, and the vendee wrongfully refuse or neglect to receive it, the seller is not liable, unless the thing perishes through his gross and wanton negligence. And if the vendee unreasonably neglect or refuse to comply with conditions precedent to delivery, or to receive the goods on delivery, the seller may, after due delay and proper precautions, resell them, (and it seems to be a common usage to sell them at auction,) and hold the buyer responsible for any deficit in the

to whom he gives the order to send them by whom he pleases." The carrier is generally considered the agent of the buyer, and not of the seller. *Dutton v. Solomonson*, 3 B. & P. 584; *Anderson v. Hodgson*, 5 Price, 630. As soon, therefore, as the goods are in the due and regular course of conveyance, they are at the risk of the purchaser, and not before. *Ullock v. Reddelein*, Dan. & Lloyd, 6.

(g) The vendor, in delivering goods to a carrier, must exercise due care and diligence, so as to provide the consignee with a remedy over against the carrier. See *Buckman v. Levi*, 3 Camp. 414; *Clarke v. Hutchins*, 14 East, 475; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Dawes v. Peck*, 8 T. R. 330.

(h) *Cothay v. Tute*, 3 Camp. 129; *Brown on Sales*, § 526; 2 Kent's Com. 500. — If it has been the usage between the parties, in former dealings, for the vendor to insure, or if he receive speci-

fic instructions to insure in any particular case, he is bound to insure. *Id.*; *Lond. Law Mag.* vol. 4, p. 359. And see *Smith v. Lascelles*, 2 T. R. 189.

(i) *Hayward v. Scougall*, 2 Camp. 56, and note; *Atkinson v. Ritchie*, 10 East, 530; *De Medeijors v. Hill*, 5 C. & P. 182. It was here held that where a shipowner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract; but whether the damages are to be nominal or otherwise must depend upon the opinion of the jury, as to whether, if the vessel had gone to the place, she would have been able to get in. — So it is no defence to a breach of a contract to deliver certain goods at a certain time, that such goods could not be had in the market at that time. *Gilpins v. Consequa*, Pet. C. C. 85; *Youqua v. Nixon*, *Id.* 221.

price. (j) If the seller sell on credit, the goods are to be delivered without payment; but if the buyer become insolvent before the time of delivery, the seller may demand security, and refuse to deliver the goods without it. (k) If no place of delivery be specially expressed in the contract, the store, shop, farm, or warehouse, where the article is sold, made, grown, or deposited, is in general the place of delivery. (l) If expressly deliverable to the vendee, but no place is named, it may be delivered to him where he is, or at his house, or at his place of business, except so far as this option of the seller is controlled by the nature of the article. For if the purchaser bought a load of cotton to be worked in his mill, it cannot, under an agreement of delivery, be delivered at his distant dwelling-house; nor should a load of hay for his stable, or a cooking range for his kitchen, be delivered at his store on the wharf. Some cases distinguish between the duty of delivery arising from a contract of sale, and a contract to deliver goods in payment of a precedent debt. In the first case *the buyer must take them where they are, and in the latter the owner must deliver them at such place as shall be reasonable from the nature of the case, or shall be pointed out by the party receiving them. (m) But in the latter case, if the contract be merely that the creditor "may have them," with no words or acts implying that they were to be carried to him, it should be enough if they are ready for him when he comes for them. There seems to be also a distinction be-

(j) *Maclean v. Dunn*, 4 Bing. 722; *Mertens v. Adcock*, 4 Esp. 251; *Girard v. Taggart*, 5 S. & R. 19; *Sands v. Taylor*, 5 Johns. 395.

(k) *Tooke v. Hollingworth*, 5 T. R. 215. And see *Bloxam v. Sanders*, 4 B. & C. 948; *Hanson v. Meyer*, 6 East, 614. And if the seller has despatched the goods to the buyer, and he becomes insolvent, the seller has a right, by virtue of his original ownership, to stop the goods if yet *in transitu*. *Mason v. Lickbarrow*, 1 H. Bl. 357; *Ellis v. Hunt*, 3 T. R. 464.

(l) 2 Kent's Com. 505; *Lobdell v. Hopkins*, 5 Cow. 516; *Goodwin v. Holbrook*, 4 Wend. 380; *Barr v. Myers*, 3

Watts & Serg. 295. If, however, a particular place be appointed by the contract, the goods must be delivered there before an action will lie for their price. *Savage Man. Co. v. Armstrong*, 19 Maine, 147; *Howard v. Miner*, 20 Maine, 325.

(m) *Bean v. Simpson*, 16 Maine, 49. In this case it was held that if no place be appointed in the contract for the delivery of specific articles, it is the duty of the debtor to ascertain from the creditor where he would receive the goods; and if this be not done, the mere fact that the debtor had the articles at his own dwelling-house at that time is no defence. And see *Bixby v. Whitney*, 5 Greenl. 192.

tween the case of very cumbersome goods and those more easily portable; and the seller is held more strictly to the duty of transporting the latter, and tendering them in specie. (*n*)

In general, if any thing be ordered of a mechanic or manufacturer, the maker may deliver it where he makes it, unless he have a shop or depository where his manufactured articles are usually taken for sale or delivery, in which case such place may be the place of delivery.

The vendee is bound to receive and pay for the thing sold at the time and place expressed or implied in the contract of sale, and to pay all reasonable charges for keeping it after sale and before delivery. (*o*) And if he refuse so to take or pay for the goods sold, he will be liable in an action for the price, or in a special action for damages, unless he can show incapacity to contract, or sufficient error, duress, or fraud.

When payment of a debt is to be made by some specific article, it is not quite settled where the article is to be delivered; whether by the payor at his own residence to the payee who must come for it, or to the payee at his residence or place of business, whither the payor must carry it. It might seem from some statements that local usages affect or decide this question in some cases. And possibly the distinction between bulky and portable articles might be carried so far as to lead to the conclusion that one who has thus to deliver an article easily carried, as a watch or a book, might be bound to take it to the payee. But we consider the law in general to be, that it is enough if the payor delivers the article at his own residence or shop. And if he there tenders it to the payee, and it be in all respects the article he should have tendered, and the payee refuse or neglect to receive it,

(*n*) *Stone v. Gilliam*, 1 Show. 149; *Currier v. Currier*, 2 New Hamp. 75; 2 Kent's Com. 508.

(*o*) In *Cole v. Kerr*, 20 Verm. 21, it was held that there is no implied contract upon the sale of personal property that the vendee shall pay the vendor for any services, in relation to the property, rendered *previous* to the completion of the sale by delivery. In this case the plaintiffs sold to the defend-

ants the wool lying unsacked in three rooms, to be paid for upon delivery, the quantity to be ascertained by weighing, but without any *express* contract as to who should be at the expense of sacking; the plaintiffs sacked the wool in sacks furnished by the defendants, and then caused it to be weighed and shipped to the defendants; and it was held, that, as the sacking preceded the delivery of the wool, the law would not

with no valid objection grounded on the article itself, or on a stipulation in the contract, then the payor is no farther responsible for what may happen to it. If it were, for instance, a carriage, and he had tendered it as it stood in his barn or warehouse, he would have no right—certainly none without sufficient notice to the payee,—to roll it out into the street, and there let it perish. For this would be a wanton injury. But if it was in the street when he tendered it, and he said, I offer it to you as your carriage, and I shall have no more to do with it, he would not be bound to take any farther care of it.

But questions of this kind generally arise in the defence to actions founded upon such contracts; and we shall again consider the subject of contracts for the delivery of specific articles, in our second volume, under the head of Defences.

SECTION VI.

CONDITIONAL SALES.

In every sale, unless otherwise expressed, there is an implied condition that the price shall be paid, before the buyer has a right to possession; and this is a condition precedent. (*p*) But it seems that in an action for non-delivery the buyer *need only aver that he was *ready* and willing to receive and pay for them, and a refusal to deliver, without averring an actual tender. (*q*) But where the right to receive payment

imply a contract on the part of the defendants to pay the plaintiffs for sacking.

(*p*) See Noy's Maxims, p. 88, where it is said:—"If I sell my horse for money, I may keep him until I am paid."⁵ See also *Hinde v. Whitehouse*, 7 East, 571; *Cornwall v. Haight*, 8 Barb. 328.—This implied condition that the price shall be paid before delivery is said to give the vendor a *lien* on the article sold until the payment.—But although the vendee may not have a right of possession in the article bought until the price is paid, yet the right of property passes *by the bargain*; and if the property is lost while yet in the possession of the vendor, without his fault, the loss

will fall on the purchaser. *Willis v. Willis*, 6 Dana, 49; *Wing v. Clark*, 24 Maine, 366; *Pleasants v. Pendleton*, 6 Rand. 473. See also *ante*, p. *441, n. (*o*), *et seq.*

(*q*) *Waterhouse v. Skinner*, 2 B. & P. 447; *Rawson v. Johnson*, 1 East, 203. The case of *Morton v. Lamb*, 7 T. R. 125, is not inconsistent with the doctrine laid down in the text, as it is explained by the subsequent case of *Rawson v. Johnson*, 1 East, 203. And there are many cases where *readiness to perform* is equivalent to performance. Thus in the case of *West v. Emmons*, 5 Johns. 179, A. covenanted to convey by a good and sufficient deed a certain

before delivery is waived by the seller and immediate possession given to the purchaser and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent and until performance the right of property is not vested in the purchaser. (*qq*) And generally, wherever in a contract of sale, it is stated that some precise fact is to be done by either party, this may amount to a condition, though not so expressed. As, where, in a contract for sale of goods,

lot of land to B., on or before a certain day, and B. covenanted to reconvey the same to A. by a mortgage, at the same time, as security, and also to execute a bond for the consideration money; and B. afterwards brought his action of covenant against A., and in his declaration averred that he was, at the time, and always had been, ready to execute the mortgage and bond, &c. It was *held*, that the covenants were mutual and dependent; that the averment of readiness to perform by the plaintiff was sufficient; and that, from the nature of the covenant, he was not bound to seal and tender the mortgage before A. had conveyed the land to him, or had offered a conveyance. See also *Miller v. Drake*, 1 Caines, 45; *Pecters v. Opie*, 2 Wms. Saund. 350, and n. 3.

(*qq*) *Porter v. Pettengill*, 12 New Hamp. 299; *Sargent v. Gile*, 8 New Hamp. 325; *Gambling v. Read*, 1 Meigs, 281; *Bigelow v. Huntley*, 8 Verm. 151; *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 9 Pick. 156; *Tibbetts v. Towle*, 3 Fairf. 341; *Bennett v. Sims*, Rice, 421; *Smith v. Lynes*, 1 Selden, 41; *Parris v. Roberts*, 12 Ire. L. 268; *Smith v. Foster*, 18 Verm. 182; *Buckmaster v. Smith*, 22 Verm. 203; *Root v. Lord*, 23 Verm. 568; *Aubin v. Bradley*, 24 Verm. 55; *Buson v. Dougherty*, 11 Humph. 50. In most of these cases the question whether the property had passed arose between the parties themselves or between the vendor and attaching creditors of the conditional vendee, and the weight of authority is as above. And in *Sargent v. Gile*, 8 N. H. 325, such a conditional sale was *held* to leave the right of property in the vendor against subsequent *bonâ fide* purchasers from the conditional vendee, on the evident ground that the vendee had no power to transfer any right not his

own. The same view appears to be taken by *Washington, J.*, in *Copland v. Bosquet*, 4 Wash. C. C. 594. But *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Keeler v. Field*, 1 Paige, 315; and *Smith v. Lynes*, 1 Selden, 41, seem to have settled it for New York law that such *bonâ fide* purchaser without notice of the conditional sale holds the property. And in *Martin v. Mathiot*, 14 Serg. & R. 214; *Rose v. Story*, 1 Barr, 190, it is decided that although under a conditional sale the property does not pass to the vendee, as between the parties, yet that such condition is fraudulent and void as to creditors of the vendee who may seize and hold the property upon execution. And at all events if an unconditional bill of sale be given and the conditional vendee be thus invested with all the *indicia* of ownership, the vendor is estopped to set up the condition against a purchaser in good faith, for valuable consideration. *Davis v. Bradley*, 24 Verm. 55. And whenever a vendor in a conditional sale claims the property against the creditors of the vendee, the burden of proof is upon him to show the condition and that it has not been complied with. *Leighton v. Stevens*, 19 Maine, 154.—It has been decided that such conditional sales are not in effect chattel mortgages and therefore void, because not recorded. *Buson v. Dougherty*, 11 Humph. 50. And where upon a sale and delivery it was agreed that the vendor should retain a *lien* upon the property until the price was paid, it was held that this agreement of the parties created a valid lien in the vendor against the vendee, and purchasers from him, and that such lien was not within the purview of the statute requiring mortgages of chattels to be recorded. *Sawyer v. Fisher*, 32 Maine, 28.

the words are "to be delivered on or before" a certain day, this is a condition precedent, and if they are not delivered on or before that day, (r) the purchaser is not bound to take the goods. So if the goods are to be delivered "on request," the buyer must allege and prove a request, this being a condition precedent to his acquiring a complete right. (s) But if the seller has incapacitated himself *from delivering by reselling, or otherwise, no request is necessary. (t)

There is another class of sales on condition, often called "contracts of sale or return." In these the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time, or a reasonable time; and if he fails to exercise this option by so returning them, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered (u)

In sales at auction there are generally conditions of sale; and where these are distinctly made known to the buyer, they are of course binding on him, and the auctioneer or the owner of the goods is bound on his part. The question

(r) *Startup v. McDonald*, 2 M. & Gr. 395. And the delivery must have been made at a reasonable time on that day, or the vendee is not bound. *Ib.*

(s) *Bach v. Owen*, 5 T. R. 409, as explained in *Radford v. Smith*, 3 M. & W. 258, where Lord Abinger said:—"In *Bach v. Owen*, the plaintiff was not entitled to the horse until he offered his own and demanded the other. Where by the *express terms* of the contract a request must precede delivery, or where that is to be implied from the nature of the contract, a request must be alleged and proved, but not otherwise."

(t) *Ranay v. Alexander*, *Yelverton*, 76, and *Metcalfe's note*; *Amory v. Brodrick*, 5 B. & Ald. 712; *Newcomb v. Brackett*, 16 Mass. 161; *Webster v. Coffin*, 14 Mass. 196. See also *ante*, note (d.) p. 445.

(u) *Moss v. Sweet*, 3 E. L. & E. Rep. 311, (overruling *Iley v. Frankenstein*, 8 Sc. N. R. 839, and *Lyons v. Barnes*, 2 Stark. 39); *Beverley v. The Lincoln Gas Light and Coke Co.* 6 Ad. & El. 829; *Bayley v. Gouldsmith*, *Peake*, 56; *Dearborn v. Turner*, 16 Maine, 17. See *Meldrum v. Snow*, 9 Pick. 441; *Blood*

v. Palmer, 2 Fairf. 414; *Eldridge v. Benson*, 7 Cush. 485; *Neate v. Ball*, 2 East, 116. And what is a reasonable time within which a contract is to be performed, or an act to be done, is, in the absence of any contract between the parties, a question of law for the court, to be determined by a view of all the circumstances of the particular case. See *Attwood v. Clark*, 2 Greenl. 249; *Hill v. Hobart*, 16 Maine, 164; *Murry v. Smith*, 1 Hawks, 41. But see *Cocker v. Franklin Hemp and Flax Man. Co.* 3 Sumner, 530; *Ellis v. Thompson*, 3 M. & W. 445.—Parol evidence of the conversations of the parties is admissible to show the circumstances under which the contract was made, and what the parties thought a *reasonable time*. *Cocker v. Franklin Hemp and Flax Man. Co. supra*. And where A. delivers property to B., on condition that if damaged, while in B.'s possession, B. shall keep it and pay for it, this is a conditional sale; and if the property is so damaged the sale becomes absolute, and assumpsit for goods sold and delivered will lie. *Bianchi v. Nash*, 1 M. & W. 545. See also *Perkins v. Douglass*, 20 Maine, 317.

whether they were sufficiently made known to the buyer would be one rather of fact than of law; as where a horse is sold by warranty, and it is the uniform custom of the auctioneer to limit all objections to the space of twenty-four hours from the sale. If these terms are a part of all the advertisements of the auctioneer, and were announced by him at the beginning of the sale, and the purchaser had come in after such announcement, and no direct proof of his knowledge of this limitation was offered, evidence would probably be admitted that he took a paper containing such advertisement, and of any other facts tending to show such knowledge* and the jury would be permitted to infer the knowledge from them if they deemed them sufficient.

If it be provided in the conditions of sale that no error or misstatement shall avoid the sale, but that there shall be a proportionate allowance on the purchase-money, this condition will not, in general, save a sale, where the error is of a material and substantial nature, although not fraudulent. (v) The test of this question, as matter of law, seems to be, whether the error or misstatement is so far material and substantial that it may be reasonably supposed the buyer would not have made the purchase had he not been so misled. And such misstatement will also avoid a sale if no reasonably accurate estimate can be made of the compensation which should be allowed therefor. (w) Any mis-

(v) *The Duke of Norfolk v. Worthy*, 1 Camp. 340; *Flight v. Booth*, 1 Bing. N. C. 370; *Leach v. Mullett*, 3 C. & P. 115. See also *Robinson v. Musgrove*, 2 M. & Rob. 92, 8 C. & P. 469, where it was held that a condition of sale, "that if any mistake shall be made in the description of the premises, or any other error whatever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given, &c." does not apply where any substantial part of the property turns out to have no existence, or cannot be found; or where the vendor has *malâ fide* given a very exaggerated description of the property. The purchaser may in such a case rescind the contract *in toto*. See also *ante*, p. 416, n. (v), *et seq.*

(w) See *Sherwood v. Robins*, 1 M. & Mal. 194, 3 C. & P. 339, where it was determined that a condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," applies only to cases where the circumstances afford a principle by which this compensation can be estimated. Therefore on the sale of a reversion expectant on the death of A. B. *without children*, an error in the statement of A. B.'s age does not come within the condition, (as it would if the reversion were simply expectant on A. B.'s death,) because it affects the probability of the other contingency, which is not a subject of calculation; and the purchaser is entitled to rescind the contract.

statement, made fraudulently, and capable of having any effect on the sale, will avoid it. Nor will the conditions of sale be binding against a purchaser, if so framed as to give the seller advantages which the buyer could not readily apprehend or understand without legal knowledge or advice; for a buyer is discharged from a purchase made under "catching conditions." (x)

*SECTION VII.

MORTGAGES OF CHATTELS.

Sales of chattels, by way of mortgage, constitute a very important, and, in recent times, a very frequent class of sales on condition. (xx) There has not been as yet much adjudi-

(x) *Adams v. Lambert*, 2 Jur. 1078; *Dykes v. Blake*, 4 Bing. N. C. 463. In the case of *Döbell v. Hutchinson*, 3 Ad. & El. 355, on a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of £55, and as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration; and the yard was not in fact comprehended in the property held for the term at £55, but was held by the vendor from year to year, at an additional rent; and such yard was essential to the enjoyment of the property leased for the twenty-three years. It was *held*, though it did not appear that the vendor knew of the defect, that this defect avoided the sale, and was not a mistake to be compensated for under the above condition, although after the day named in the conditions for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him. — But where the particulars of sale described the property as a family residence, with the right of a pew in the

centre aisle of the parish church, and the title of the pew was defective, as the use of the pew was not essential to the enjoyment of the property, this error gave a right to compensation only. *Cooper v. —*, 2 Jur. 29. And where there was a written agreement to sell and assign "the unexpired term of *eight years'* lease and good will" of a public house; it was *held* that the purchaser could not refuse to perform the agreement on the ground that when it was entered into there was only seven years and seven months of the term unexpired. Lord *Ellenborough* said: — "The parties cannot be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must therefore receive a reasonable construction; and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including therefore the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might have had substantially what he agreed to purchase." *Belworth v. Hassell*, 4 Camp. 140.

(xx) Sec 4 Kent's Com. 138, where the distinction between a pledge and a mortgage of personal property is fully

cation in respect to them. Whether a mortgage of personality has at common law any equity of redemption does not seem to be positively determined; but it is believed that equity would interfere to prevent gross injustice. (y) This subject* is regulated in many of the States by statute, and, in general, record is required if possession of the goods be retained by the mortgagor; and an equity of redemption is allowed. (z) It seems that a mortgage of personal property, where the mortgagor retains possession, is not valid against a subsequent *bonâ fide* purchaser or attaching creditor, if there be neither record of the mortgage, nor actual knowledge of it on the part of the purchaser or creditor. (a)

It has been frequently attempted to make a mortgage of

set forth. A mortgage of goods is a conveyance of title *upon condition*, and if the condition is not performed such title becomes absolute *in law*, but *equity* will, it seems, interfere to compel a redemption. Story on Bailm. § 287; *Flanders v. Barstow*, 18 Maine, 357; 2 Story, Eq. Jur. § 1031. As to what instruments will be construed as a mortgage, and what as merely a pledge, see *Langdon v. Buel*, 9 Wend. 80; *Wood v. Dudley*, 8 Verm. 435; *Barrow v. Paxton*, 5 Johns. 258; *Coty v. Barnes*, 20 Verm. 78; *Whitaker v. Sumner*, 20 Pick. 399, and *post*, Bailments, under the head of Pledge. A mortgage of personal property, like that of real estate, may consist of an absolute bill of sale, and a separate instrument of defeasance, given at the same time. *Brown v. Bement*, 8 Johns. 96; *Hopkins v. Thompson*, 2 Porter, 433; *Winslow v. Tarbox*, 18 Maine, 132; *Williams v. Roser*, 7 Missouri, 556; *Barnes v. Holcomb*, 12 S. & M. 306. And although the bill of sale is absolute, and no *writing* of defeasance is given back, parol testimony is still admissible to prove that it was intended only as collateral security. *Reed v. Jewett*, 5 Greenl. 96; *Carter v. Burris*, 10 S. & M. 527; *Freeman v. Baldwin*, 13 Ala. 246. But see *Whitaker v. Sumner*, 20 Pick. 399; *Montany v. Rock*, 10 Missouri, 506. It is well settled that mortgages of personal property need not be under seal. *Despatch Line v. Bellamy Co.* 12 New Hamp. 205; *Milton v. Mosher*, 7 Metc. 244; *Flory v. Denny*, 11 E. L. & E. 584.

(y) In *Hinman v. Judson*, 13 Barb.

629, which was an action brought by the mortgagee of personal property, against a party claiming under the mortgagor, for conversion of the property, it was held that a mortgagor of chattels may redeem them after condition broken, and before they are sold on the part of the mortgagee, and that in the present action the defendant might exercise this right by reducing the damages to be recovered, to the amount actually due upon the mortgage debt.

(z) Thus, in Massachusetts, an equity of redemption of sixty days is allowed the mortgagor after condition broken, or after notice of an intention to foreclose given by the mortgagee for such breach. Mass. Rev. Stat. c. 107, § 40; Stat. of 1843, c. 72. Nearly similar provisions exist in Maine. Maine Rev. Stat. c. 125, § 30.

(a) As between *mortgagor and mortgagee*, a mortgage of personal property is valid, although there be no delivery of the property, and no possession by the mortgagee, or record of the mortgage on the registry. *Smith v. Moore*, 11 New Hamp. 55; *Winsor v. McLellan*, 2 Story, 492; *Hall v. Snowhill*, 2 Green, 8. But as to subsequent purchasers, and attaching creditors of the mortgagor, without notice of the existence of the mortgage, by statute in several States, the mortgagee must either have and retain possession of the mortgaged property, or the mortgage must be recorded in the town where the mortgagor resided at the time of its execution. *Smith v. Moore*, *supra*. — And where such provision is made by

personalty extend over chattels not then owned by the mortgagor, but to be subsequently purchased. As where a shop-keeper makes a mortgage of "all the goods in his store, and of all which shall be bought to replace or renew the present stock." Such a mortgage might operate against the mortgagor somewhat by way of estoppel; but it has been decided that it is not valid against a third party. (b) And, where the mortgagee permitted the mortgagor to remain in possession, for the purpose and with the power of selling the goods, such mortgage, although recorded, would not avoid the sale, even if it did not express in any way such purpose and power, if they could be inferred from the circumstances.

statute, the recording is equivalent to actual delivery. *Forbes v. Parker*, 16 Pick. 462. But in New York it has been decided that the record of a mortgage does not rebut the presumption of fraud occasioned by the mortgagor's retention of the property, such record being merely an additional requirement. *Otis v. Sill*, 8 Barb. 102. The necessity of delivery to the mortgagee or of a record, is wholly the effect of statutory provisions, and at common law a mortgage of personal property *might be* valid, in the absence of fraud, even against subsequent *bonâ fide* purchasers and attaching creditors, although the mortgagor remained in possession, and although no record of the mortgage existed. *Holbrook v. Baker*, 5 Greenl. 309; *Bissell v. Hopkins*, 3 Cow. 166; *Bucklin v. Thompson*, 1 J. J. Marsh. 223; *Letcher v. Norton*, 4 Scam. 575; *Ash v. Savage*, 5 New Hamp. 545; *Homes v. Crane*, 2 Pick. 610. Such continued possession by the mortgagor might be sufficient evidence of fraud, but it would not alone be, in most States, conclusive. *Ib.* In Vermont it would be. *Russell v. Fillmore*, 15 Verm. 130. Although the mortgagor remain in possession, and without any record of the mortgage, it seems that a subsequent purchaser, or attaching creditor, *having actual notice* of the existence of the mortgages, acquires no rights against the mortgagee, the latter being guilty of no fraud. *Sanger v. Eastwood*, 19 Wend. 514; *Stowe v. Meserve*, 13 New Hamp. 46; *Gregory v. Thomas*, 20 Wend. 17. The contrary has been held in Massachusetts. *Travis v. Bi-*

shop, 13 Met. 304. And see *Denny v. Lincoln*, Id. 200.

(b) *Jones v. Richardson*, 10 Met. 481. In this case the property mortgaged was thus described, viz:—"The whole stock in trade of said A., as well as each and every article of merchandise which the said A. (the mortgagor) bought of one T. W., as every other article constituting said A.'s stock in trade, in the shape the same is and *may become*, in the usual course of the said A.'s business as a trader." It was admitted that the goods in question, which had been attached by a creditor of the mortgagor, were at the time of the attachment the stock in trade of the said A., but that only a part of them was owned by him, until after he made said mortgage. The court, after a critical review of the authorities bearing upon this point, *held* that the mortgagee could not, as against third persons, acquire under this mortgage any valid title to those goods purchased by the mortgagor after the giving of the mortgage. The same view is supported by the late case of *Lunn v. Thornton*, 1 C. B. 379; *Rhines v. Phelps*, 3 Gilman, 455; *Barnard v. Eaton*, 2 Cush. 294; *Pettis v. Kellogg*, 7 Cush. 471; *Winslow v. Merchants' Ins. Co.* 4 Met. 306; *Otis v. Sill*, 8 Barb. 102. The case of *Abbott v. Goodwin*, 20 Maine, 408, which may seem to conflict with the rule laid down in the text, does not seem to us correct, and is apparently inconsistent with the views of the same court as expressed in the later case of *Goodenow v. Dunn*, 21 Maine, 96.

Supposing the whole transaction to be *bonâ fide*, the mortgagor would be considered as selling the goods as the agent of the mortgagee, and the proceeds would belong to him; and, if sold on credit, the debt could not be reached by an attaching creditor through the trustee process. (c)

(c) Unless there is some stipulation in the mortgage, allowing the mortgagor to remain in possession of the goods, the right of immediate possession vests, together with the property, in them, in the mortgagee; and he may have an action against any one taking them from the mortgagor. *Pickard v. Low*, 15 Maine, 48; *Brckett v. Bulard*, 12 Met. 308; *Coty v. Barnes*, 20 Verm. 78. And parol proof is not admissible to show an agreement that the mortgagor should remain in possession; the mortgage itself being silent upon the subject. *Case v. Winship*, 4 Blackf. 425. And although the mortgage contains an express stipulation that the mortgagor shall remain in possession, until default of payment, and with a power to sell for the payment of the mortgage debt, the mortgagee may nevertheless sustain trover against an officer attaching the goods as the property of the mortgagor. *Melody v. Chandler*, 3 Fairf. 282; *Forbes v. Parker*, 16 Pick. 462; *Welch v. Whittemore*, 25 Maine, 86; *Ferguson v. Thomas*, 26 Maine, 499. In the late case of *Barnard v. Eaton*, 2 Cush. 294, where a mortgage was made of all the goods then in the mortgagor's store, and of all goods, &c., which might be afterwards substituted by the mortgagor for those which he then possessed,—the mortgage providing that until default the mortgagor might use and make sales of the mortgaged property,

other goods, &c., of equal value being substituted therefor,—it was *held*, that the mortgage could not apply to goods not in existence, or not capable of being identified, at the time it was made, or to goods intended to be afterwards purchased to replace those which should be sold. It was also *held* in the same case that an agreement, in a mortgage of the stock of goods then in the mortgagor's store, that, until default, the mortgagor might retain possession of the property, and makes sales thereof in the usual course of his trade, other goods of equal value being substituted by him for those sold, will not authorize the mortgagor to put the mortgaged property into a partnership, as his share of the capital. In New York, unless the mortgage is filed in pursuance of the statute, the mortgagor cannot remain in possession for the purpose of selling the goods. *Camp v. Camp*, 2 Hill, 628. See also *Collins v. Myers*, 16 Ohio, 547. And in *Edgell v. Hart*, 13 Barb. 380, where a mortgage, although recorded, was intended to cover property afterwards to be procured by the mortgagor, and in it the mortgagee gave him the right to sell the goods for ready pay, without being under any obligation to apply the proceeds to the discharge of the mortgage, or any other debt, it was *held* that the mortgage was void as calculated to delay, hinder, and defraud other creditors of the mortgagor.

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CHAPTER V.

WARRANTY.

THE warranties which accompany a sale of chattels are of two kinds in respect to their subject-matter; they are a warranty of title and a warranty of quality. They are also of two kinds in respect to their form, as they may be express or implied.

Blackstone says, "a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." (*d*) But he also says afterwards, "in contracts for sales, it is constantly understood, that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him to exact damages for the deceit." (*e*) From this it might be inferred that the action is grounded on the deceit, and therefore does not lie where there is no deceit, as where one sells as his own that which is not his own, but which he verily believes to be his own. But although the English authorities are somewhat uncertain and conflicting, we consider that a rule is recognized in the English courts, or in some of them, which, although not distinctly and positively asserted, nor so well supported by direct decision as the American rule, may yet be regarded as essentially the same. (*f*) And in this

(*d*) 2 Bl. Com. 451.

(*e*) 3 Bl. Com. 166, Wendell's ed. and note.

(*f*) *Medina v. Stoughton*, 1 Salk. 210; *Crosse v. Gardner*, Carth. 90. This subject was much discussed in England, in the late case of *Morley v. Attenborough*, 3 Exch. 500. There a person

having hired a harp, pledged it with a pawnbroker for his own debt, without authority from the true owner. The harp not being redeemed at the stipulated time, the pawnbroker sold it at auction at his usual quarterly sales. The harp was advertised as forfeited property, pledged with the broker. The

country it seems to be now well settled, by adjudications in many of our States, that the seller of a chattel, (g) (if in possession,) warrants by implication that it is his own, and is

purchaser at the auction bought, not knowing that the harp did not belong to the party pledging it; but after the sale, being sued by the former owner, he gave up the harp, and paid the costs. He then commenced an action against the pawnbroker for the price at which he bid off the harp, on a warranty of title. It was agreed that there was no *express* warranty; and the court held that *under these* circumstances there was no implied warranty of an absolute and perfect title, on the part of the pawnbroker, but only that the subject of the sale was a pledge, and irredeemable, and that the pawnbroker was not cognizant of any defect of title to it. This case has sometimes been cited as deciding the general principle that in *all cases* of sales of personal property there is no implied warranty of title, and it has been thought to be opposed to the American doctrine on this subject; and some of the language of *Parke, B.*, who delivered the judgment, may go somewhat to sustain such a view. But we conceive that the case, as an *authority*, cannot be pressed farther than the actual facts and circumstances warrant; and in this light the decision itself seems not in conflict, but in harmony with the American cases. For a sale by a pawnbroker, under the circumstances detailed in that case, may be analogous to that of a sale of a chattel by a sheriff on execution. And here all authorities, English and American, agree that the sheriff does not impliedly warrant the title of the execution debtor to the property seized on execution; but only that he does not know that he had not title to the goods. *Peto v. Blades*, 5 Taunt. 657; *Hensley v. Baker*, 10 Missouri, 157; *Chapman v. Speller*, 19 Law J. Rep. (N. S.) Q. B. 239; *Yates v. Bond*, 2 McCord, 382; *Bashore v. Whisler*, 3 Watts, 490; *Stone v. Pointer*, 5 Munf. 287; *Morgan v. Fencher*, 1 Blackf. 10; *Davis v. Hunt*, 2 Bailey, 412; *Friedly v. Scheetz*, 9 S. & R. 156; *Rodgers v. Smith*, 2 Carter, (Ind.) 526. So a sale by an executor, administrator, or other trustee, does not raise an implied warranty of title; such person does not sell the property as his own; he does not offer it as his own; and unless

guilty of fraud, he would not be responsible, if the title failed. *Ricks v. Dillahunty*, 8 Porter, 134; *Forsythe v. Ellis*, 4 J. J. Marsh. 298. On consideration of all the cases on this subject, we must believe the language of Blackstone to be correct, that if a person in possession of a chattel sells it, *as his own*, there is an implied warranty of title. That the case of *Morley v. Attenborough* should not be considered as an authority, further than the actual facts of the case warrant, see the late case of *Simms v. Marryatt*, 7 E. L. & E. R. 330, where, however, there was an *express* warranty. Lord Campbell said:—"It does not seem necessary to inquire what is the law as to implied warranty of title on the sales of personal property, *which is not quite satisfactorily settled*. According to *Morley v. Attenborough*, if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawn, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawn. Beyond that the decision does not go, but a great many questions are suggested in the judgment which still remain open. Although the maxim of *caveat emptor* applies generally to the purchaser of personal property, there may be cases where it would be difficult to apply the rule." It seems always to have been held that if a vendor sells, knowing he has no title, and conceals that fact, he is liable as for a fraud. *Early v. Garret*, 9 B. & C. 932; *Sprigwell v. Allen*, Aleyn, 91. And in *Robinson v. Anderton*, Peake, 94, a purchaser of fixtures, the title of which was not in the vendor, was allowed to recover their price as money had and received, although the vendor was not guilty of fraud, and *bonâ fide* believed himself the owner.

(g) This must be confined to sales of *chattels*. In the sale of *real estate* by deed there are no implied warranties. The words "containing so many acres," &c., do not import a covenant of quantity. *Huntly v. Waddell*, 12 Ired. 32; *Rickets v. Dickens*, 1 Murph. 343; *Powell v. Lyles*, 1 Id. 348; *Roswel v. Vaughan*, Cro. Jac. 196.

answerable to the purchaser if it be taken from him by one who has a better title than the seller, whether the seller knew the defect of his title or not, and whether he did or did not make a distinct affirmation of his title. But if the seller is out of possession, and no affirmation of title is made, then it may be said that the purchaser buys at his peril. And this we think the established rule of law in this country. (*h*)

(*h*) No case more directly asserts the implied warranty of title, in all cases of sales of personal property, than that of *Defreeze v. Trumper*, 1 Johns. 274, (1806.) There the purchaser of a horse brought a suit against the vendor to recover damages; the title having been in a third person, and not in the vendor, at the time of the sale. The principal objection at the trial was, that the evidence did not prove any warranty, nor any fraud in the sale. But the court said: — "We are of opinion that an express warranty was not requisite, for it is a general rule that the law will imply a warranty of title upon the sale of a chattel." And this doctrine has been steadily adhered to and uniformly followed by the courts of New York. See *Heermance v. Vernoy*, 6 Johns. 5, (1810); *Vibbard v. Johnson*, 19 Johns. 77, (1821); *Swett v. Colgate*, 20 Johns. 196, (1822); *Reid v. Barber*, 3 Cowen, 272, (1824); *McCoy v. Artcher*, 3 Barb. 323, (1848.) In this case a very able judgment was pronounced, in favor of the doctrine of the text, namely, that in sales of personal property, in the possession of the vendor, there is an implied warranty of title, for the possession is equivalent to an affirmation of title. But it is held otherwise where the property sold is then in the possession of a third person, and the vendor made no affirmation or assertion of ownership. And the same was again distinctly affirmed in the still later case of *Edick v. Crim*, 10 Barb. 445. *Dresser v. Ainsworth*, 9 Barb. 619, is a valuable case upon this point. It is there held that this implied warranty of title not only means that the vendor has a right to sell, but it extends to a prior lien or incumbrance. The essence of the contract is, that the vendor has a perfect title to the goods sold; that the same are unincumbered, and that the purchaser will acquire by the sale a title free and clear, and shall enjoy the possession without disturbance

by means of any thing done or suffered by the vendor. So in *Coolidge v. Brigham*, 1 Met. 551, *Wilde, J.*, says: — "In contracts of sales a warranty of title is implied. The vendor is always understood to affirm that the property he sells is his own. And this implied affirmation renders him responsible, if the title proves defective. This responsibility the vendor incurs, although the sale may be made in good faith, and in ignorance of the defect of his title. *This rule of law is well established*, and does not trench unreasonably upon the rule of the common law, *caveat emptor*." The general doctrine of the text is also directly asserted or recognized in *Bucknam v. Goddard*, 21 Pick. 70; *Hale v. Smith*, 6 Greenl. 420; *Butler v. Tufts*, 13 Maine, 302; *Thompson v. Towle*, 32 Maine, 87; *Lines v. Smith*, 4 Florida, 47; *Lackey v. Stouder*, 2 Carter, (Ind.) 376; *Gookin v. Graham*, 5 Humph. 480; *Trigg v. Faris*, 5 Humph. 343; *Dorsey v. Jackman*, 1 S. & R. 42; *Eldridge v. Wadleigh*, 3 Fairf. 372; *Cozzins v. Whitaker*, 3 Stew. & Port. 322; *Mockbee v. Gardner*, 2 Harr. & Gill, 176; *Payne v. Rodden*, 4 Bibb, 304; *Inge v. Bond*, 3 Hawks, 103, *Taylor, C. J.*; *Chism v. Woods*, Hardin, 531; *Scott v. Scott*, 2 A. K. Marsh, 217; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Boyd v. Bopst*, 2 Dall. 91; *Colcock v. Good*, 3 McCord, 513; *Ricks v. Dillahanty*, 8 Porter, 134. See also a well reasoned article in 12 Am. Jur. 311; 2 Kent's Com. 478. We have been thus full in the citation of authorities upon this apparently well settled point, because there is still some conflict of opinion upon it, and because the American doctrine has been thought not to rest upon good foundation. The arguments and authorities upon the opposite side of the question are very ably stated in 11 Law Reporter, (Boston,) 272, *et seq.*

All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties; provided, however, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For these words of warranty are usually subjected to a careful, if not, a precise and stringent interpretation, as it is the fault of the buyer who asks for or receives a warranty, if it does not cover as much ground and give him as effectual protection as he intended. (i)

If there be no express warranty, the common law, in general, implies none. Its rule is, unquestionably, both in Eng-

(i) A *general* warranty is said not to cover defects plain and obvious to the purchaser, or of which he had cognizance; thus, if a horse be warranted *perfect*, and want a tail or an ear. 13 H. 4, 1 b, pl. 4; 11 Edw. 4, 6 b, pl. 10; *Southerne v. Howe*, 2 Rol. R. 5; *Long v. Hicks*, 2 Hump. 305; *Schuyler v. Russ*, 2 Caines, 202; *Margetson v. Wright*, 5 M. & P. 606; *Dillard v. Moore*, 2 Eng. [Ark.] 166. The same rule applies whether the warranty is express or whether a warranty is implied by law, from a sound price, as is the case in some States. *Richardson v. Johnson*, 1 Louis. Ann. Rep. 389. But care should be taken not to misunderstand nor misapply this rule. A vendor *may* warrant against a defect which is patent and obvious, as well as against any other. And a general warranty that a horse was *sound*, for instance, would in our judgment be broken, if one eye was so badly injured, or so malformed, as to be entirely useless, and although this defect might have been noticed by the purchaser at the time of sale. He may choose to rely upon the warranty of the vendor, rather than upon his own judgment, and we see not why he should not be permitted to do so. A warranty that a horse is sound is broken if he cannot see with one eye. *House v. Fort*, 4 Black. 293. Why may not the vendor be equally liable if one eye was entirely gone? In *Margetson v. Wright*, 8 Bing. 454,

7 Bing." 603, a horse warranted sound had a *splint* then; this was *visible* at the time of sale; but the animal was not then lame from it. He afterwards became lame from the effects of it; and the warranty was held to be broken. In *Liddard v. Kain*, 2 Bing. 183, an action was brought to recover the value of horses sold and delivered. The defence was, that at the time of the purchase the plaintiff agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and that at the end of the fortnight, one had a cough, and the other a swelled leg; but it also appeared that the seller informed the buyer that one of the horses had a cold on him, and that this as well as the swelled leg was apparent to every observer. The jury having found a verdict for the defendant, a rule for a new trial was moved for, on the ground that where defects are patent a warranty against them is inoperative. The court refused the rule, on the ground that the warranty did not apply to the time of the sale, but to a subsequent period. — In *Stucky v. Clyburn, Cheves*, 186, a slave sold had a *hernia*; this was known to the buyer. Yet it was held to be within an express warranty of soundness. So of a swelling in the abdomen, plainly visible and known to the purchaser. *Wilson v. Ferguson, Cheves*, 190. So where a slave had the *scrofula* at the time of sale. *Thompson v. Botts*, 8 Missouri, 710. And

land and in this country, *caveat emptor*, (*j*)—let the purchaser take care of his own interests. This rule is apparently severe, and it sometimes works wrong and hardship; and it is not surprising that it has been commented upon in terms of strong reproach, not only by the community, but by members of the legal profession; and these reproaches have in some instances been echoed from tribunals which acknowledged the binding force of the rule. But the assailants of this rule have not always seen clearly how much of the mischief apparently springing from it arises rather from the inherent difficulty of the case. As a general rule, we must have this or its opposite; and we apprehend that the opposite rule,—that every sale implies a warranty of quality,—would cause an immense amount of litigation and injustice. It is always in the power of a purchaser to demand a warranty; and if he does not get one, he knows that he buys without warranty, and should conduct himself accordingly; for it is always his duty to take a proper care of his own interests, and to use all that precaution or investigation which such case requires; and he must not ask of the law to indemnify him against the consequences of his own neglect of duty.

The decisions under the rule of *caveat emptor* have fluctuated very much, and there is a noticeable conflict and uncertainty in respect to many points of the law of warranty upon sales. But some exceptions and qualifications to the general rule are now nearly, if not quite, established, both in England and in this country; and the rule of *caveat emptor*, thus modified, may perhaps be regarded as upon the whole well adapted to protect right, to prevent wrong, and to provide a remedy for a wrong where it has occurred.

One important and universal exception is this; the rule never applies to cases of fraud; never proposes to protect a

where a defect is obvious, yet if the purchaser be misled as to its character or extent, a warranty is implied. *Wood v. Ashe*, 3 Strob. L. 64.

(*j*) *Mixer v. Coburn*, 11 Met. 559; *Winsor v. Lombard*, 18 Pick. 59; *Parkinson v. Lee*, 2 East, 321; *Stuart v.*

Wilkins, Dougl. 20; *Johnston v. Cope*, 3 Har. & Johns. 89; *Seixas v. Woods*, 2 Caines, 48; *Holden v. Dakin*, 4 Johns. 421; *Dean v. Mason*, 4 Conn. 428; *West v. Cunningham*, 9 Porter, 104; *Mores v. Mead*, 1 Denio, 378; *McKinney v. Fort*, 10 Tex. 220.

seller against his own fraud, nor to disarm a purchaser from a defence or remedy against a seller's fraud. (*k*) It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. If the seller knows of a defect in his goods, which the buyer does not know, and if he had known, would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought perhaps on moral grounds to avoid the transaction. But this *moral* fraud has not yet grown into a *legal* fraud. In cases of this kind there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, there the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be *active fraud*. The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent; if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. The distinction seems to be — and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions — the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself. (*l*)

(*k*) Irving v. Thomas, 18 Maine, 418; Otts v. Alderson, 10 S. & M. 476.

(*l*) The case of Laidlaw v. Organ, 2 Wheat. 178, is the leading case on this subject in America. The facts were that one Shepherd, interested with Organ, and in treaty with Girault, a member of the firm of Laidlaw & Co., at New Orleans, for a quantity of tobacco, had secretly received intelligence over

night of the peace of 1815, between England and the United States, which raised the value of the article from thirty to fifty per cent. Organ called on Girault on Sunday morning, a little after sunrise, and was asked if there was any news, by which the price of it might be enhanced; but there was no evidence that Organ had asserted or suggested any thing to induce a belief

As mere silence implies no warranty, neither do remarks which should be construed as simple praise or commendation; (*m*) but any distinct assertion or affirmation of qua-

that such news did not exist, and under the circumstances the bargain was struck. *Marshall*, C. J., delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession, and that it would be difficult to circumscribe the contrary doctrine within proper limits, *where the means of intelligence are equally accessible to both parties*. *Bench v. Sheldon*, 14 Barb. 66; *Kintzing v. McElrath*, 5 Barr, 467, also well illustrate the principle of the text, that where the means of knowledge is accessible to both parties, each must judge for himself, and it is neither the duty of the vendor to communicate to the vendee any superior knowledge which he may have of the value of the commodity, nor of the vendee to disclose to the vendor any facts which he may have, rendering the property more valuable than the vendor supposed. And in the case of *Irvine v. Kirkpatrick*, 3 E. L. & E. 17, it was decided by the House of Lords that a concealment upon a sale of real estate, to avoid the sale, must be of something that the party concealing was bound to disclose. See also *Blydenburgh v. Welsh*, 1 Baldwin, 331; *Calhoun v. Vechio*, 3 Wash. C. C. R. 165; *Eichelberger v. Barnitz*, 1 Yeates, 307; *Pearce v. Blackwell*, 12 Ire. J. 49. The case of *Hill v. Gray*, 1 Stark. 434, might seem at first view to conflict with this doctrine. There a picture was sold, which the buyer believed had been the property of Sir Felix Agar, a circumstance which might have enhanced its value in his eyes. The seller knew that the purchaser was laboring under this delusion, but did not remove it, and it did not appear that he either induced or strengthened it. In an action for the price, Lord Ellenborough nonsuited the plaintiff, saying the picture was sold under a deception. The seller ought not to have let in a suspicion on the part of the purchaser which he knew enhanced its value. He saw the purchaser had fallen into a delusion, but did not remove it. From the report

itself, it might seem that Lord Ellenborough here held that silence alone was a fraudulent concealment, sufficient to vitiate the contract. But the case is explained in the late English case of *Keates v. Cadogan*, 2 E. L. & E. 318, *Jervis, C. J.*, saying in *Hill v. Gray*, there was a "positive aggressive deceit. Not removing the delusion might be equivalent to an express misrepresentation." And in that case it was held that where the intended lessor of a particular house knows that the house is in a ruinous state, and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the lessee. See also *Fox v. Mackreth*, 2 Bro. C. C. 420. — On the other hand, the vendor must not practice any artifice to conceal defects, nor make any representations for the purpose of throwing the buyer off his guard. See *Matthews v. Bliss*, 22 Pick. 48; *Arnot v. Biscoe*, 1 Ves. Sen. 95. For it is well settled that misrepresentations of material facts, by which a purchaser is misled, vitiate the contract. *Bench v. Sheldon*, 14 Barb. 66; *Doggett v. Emerson*, 3 Story, 700; *Daniel v. Mitchell*, 1 Id. 172; *Small v. Attwood*, 1 Younge, 407; *Hough v. Richardson*, 3 Story, 659; *Warner v. Daniels*, 1 W. & M. 90. The whole subject is ably examined in 2 Kent's Com. 482, *et seq.* See also *Bean v. Herrick*, 3 Fairf. 262; *Ferebee v. Gordon*, 13 Ire. L. 350; *Wood v. Ashe*, 3 Strob. L. 64.

(*m*) Thus, in *Arnott v. Hughes*. Chitty on Cont. 393, note, an action was brought on a warranty that certain goods were fit for the China market. The plaintiff produced a letter from the defendant, saying that he had goods fit for the China market, which he offered to sell cheap. Lord Ellenborough held that such a letter was not a warranty,

lity made by the owner *during* a *negotiation* (*n*) for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty. If such affirmation were made in good faith it is still a warranty; and if made with a knowledge of its falsity, it is a warranty, and it is also a fraud.

It is certain that the word *warrant* need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be; or an equivalent to such undertaking. (*o*) It may be often

but merely an invitation to trade, it not having any specific reference to the goods actually bought by the plaintiff.

(*n*) It is essential that a warranty, to be binding, be made *during* the negotiation; if made after the sale is completed it is without consideration and void. *Roscorla v. Thomas*, 3 Q. B. 234; *Bloss v. Kittridge*, 5 Verm. 28; *Towell v. Gatewood*, 2 Scammon, 22.—If, however, the vendor, in a negotiation between the parties a few days before the sale, offer to warrant the article, the warranty will be binding. *Wilmot v. Hurd*, 11 Wend. 584; *Lysney v. Selby*, *Ld. Raym.* 1120.

(*o*) The authorities, from *Chandelor v. Lopus*, Cro. Jac. 4, to the present day, all agree that a bare affirmation, not intended as a warranty, will not make the vendor liable. *Bacon v. Brown*, 3 Bibb, 35; *Davis v. Meeker*, 5 Johns. 354; *Budd v. Fairmaner*, 8 Bing. 52, where a receipt for "a grey four year old colt" was *held* only an affirmation or representation that he was four years old, but was no warranty to that effect. See also *Seixas v. Woods*, 2 Caines, 48, a very strong case; *Holden v. Dakin*, 4 Johns. 421; *Sweet v. Colgate*, 20 Johns. 196; *Conner v. Henderson*, 15 Mass. 320; *Stewart v. Dougherty*, 3 Dana, 479; *House v. Fort*, 4 Blackf. 293. So where a horse was sold under the following advertisement:—"To be sold, a black gelding, five years old; has been constantly driven in the plough. Warranted," the warranty was held to apply only to his soundness, and the statement as to age was considered only as

an affirmation or representation of his age, and as creating no liability unless there was deceit. *Richardson v. Brown*, 1 Bing. 344. For similar instances, see *Dunlop v. Waugh*, Peake, 123; *Power v. Barham*, 4 Ad. & El. 473; *Jendwine v. Slade*, 2 Esp. 572; *Willard v. Stevens*, 4 Foster, 271. On the other hand, any affirmation of the quality, or condition of the thing sold, (not intended as matter of opinion or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied upon by the purchaser, is an express warranty. *Osgood v. Lewis*, 2 Har. & Gill, 495, a very important case on the subject of warranty. *Hawkins v. Berry*, 5 Gilman, 36; *Hillman v. Wilcox*, 30 Maine, 170; *Ottis v. Alderson*, 10 S. & M. 476; *McGregor v. Penn*, 9 Yerg. 74; *Kinley v. Fitzpatrick*, 4 Howard, (Miss.) 59; *Beals v. Olmstead*, 24 Verm. 115. See also *Towell v. Gatewood*, 2 Scammon, 22; *Pennock v. Tilford*, 17 Penn. 456. In *Roberts v. Morgan*, 2 Cow. 438, the plaintiff and defendant being in negotiation for an exchange of horses, the former said "he would not exchange unless the latter would warrant his horse to be sound." The defendant answered:—"He is sound, except the bunch on his leg." The horse had the glanders. *Held*, that this was an express warranty. See also *Oneida Manuf. Society v. Lawrence*, 3 Cow. 440; *Chapman v. Murch*, 19 Johns. 290. In *Cook v. Mosely*, 13 Wend. 277, (a sale of a mare,) the buyer asked the seller if the

difficult to distinguish between such warranty as this, and the naked praise (*nuda laus*) or a simple commendation, (*simplex commendatio*) which neither by the common law nor by the civil law impose any obligation; but, as matter of law, the distinction is well settled. If a bill of sale be given, in which the article sold is described, we consider it now settled that this description has the full effect of warranty. (p)

mare was lame; the latter answered:—"She was not lame, and *that he would not be afraid* to warrant that she was sound every way, as far as he knew." *Held* to amount to a warranty. In *Beeman v. Buck*, 3 Verm. 53, the same principle is adopted. So in *Wood v. Smith*, 4 C. & P. 45, the buyer of a horse said to the seller: "She is sound, of course?" The latter said: "Yes, to the best of my knowledge." On being asked if he would warrant her, he replied: "I never warrant. I would not even warrant myself." This was held to amount to a qualified warranty. The general rule of the text is well stated in *Ricks v. Dillahunty*, 8 Porter, 134. See also *Carley v. Wilkins*, 6 Barb. 557, where it was *held* that a representation made by a vendor, upon a sale of flour in barrels, that it is in quality superfine, or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the buyer's agent that he may rely upon such representation, is a warranty of the quality of the flour. In *Cave v. Coleman*, 3 M. & R. 2, the vendor of a horse told the vendee, "you may depend upon it, the horse is perfectly quiet, and free from vice." This was *held* to amount to an express warranty. But see *Erwin v. Maxwell*, 3 Murphy, 241. In *Jackson v. Wetherill*, 7 Serg. & Rawle, 480, the Supreme Court of Pennsylvania, although recognizing the rule that no particular words were necessary to constitute a warranty, *held*, that when the vendor of a horse told the purchaser before the sale that *he was sure she was perfectly safe, kind, and gentle in harness*, this created no warranty, being but a bare affirmation of quality. See also *McFarland v. Newman*, 9 Watts, 56, S. P. In *Shepherd v. Temple*, 3 New Hamp. 455, the vendor of a lot of timber, most of which was covered with snow, declared that it was of as good quality as some of the sticks

which were visible; *held* that this did not necessarily amount to a warranty. See *Stevens v. Fuller*, 8 N. Hamp. 463, as to what is competent evidence to prove a warranty. A statement that a horse's eyes "are as good as any horse's eyes in the world," does not, *of itself*, necessarily amount to a warranty. *House v. Fort*, 4 Blackf. 293. The question whether any particular affirmation amounts to a warranty is for the jury. The criterion is the understanding and intention of the parties. *Duffee v. Mason*, 8 Cow. 25; *Morrill v. Wallace*, 9 New Hamp. 111; *Chapman v. Murch*, 19 Johns. 290. It is for the jury to say whether the language used was intended as a mere expression of opinion, or belief, or as a representation. *Whitney v. Sutton*, 10 Wend. 411; *Foster v. Caldwell*, 18 Verm. 176; *Bradford v. Bush*, 10 Ala. 386; *Baum v. Stevens*, 2 Ired. 411; *Foggart v. Blackweller*, 4 Ired. 238. A bare affirmation of soundness of a horse which is then exposed to the purchaser's inspection, is not, *per se*, a warranty. It is of itself only a representation. To give it the effect of a warranty, it must be shown to the satisfaction of the jury that the parties intended it to have that effect. *House v. Fort*, 4 Blackf. 296. See also *Tyre v. Causey*, 4 Harring. 425. The affirmation must be made to assure the buyer of the truth of the fact asserted, and induce him to make the purchase, and must be so received and relied upon by him. *Ender v. Scott*, 11 Illinois, 35; *Humphreys v. Comline*, 8 Blackf. 508.

(p) *Henshaw v. Robins*, 9 Met. 83, is one of the best considered, as well as one of the most recent cases upon this subject. There the bill of sale was as follows:—"Henshaw & Co. bo't of T. W. S. & Co. two cases of indigo, \$272.35." The article sold was not indigo, but principally Prussian blue. There was no fraud imputed to the vendor, and the article was so prepared

One exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should

as to deceive skilful dealers in indigo. The naked question was presented, whether the bill of sale constituted a warranty that the article was *indigo*. The court, after an able analysis of the cases upon this point, decided in the affirmative. The same question had been very ably considered by the same court in the prior case of *Hastings v. Lovering*, 2 Pick. 214. In that case the bill of parcels was:—"Sold E. T. H. 2000 gallons *prime quality winter oil*." The article sold was *oil*, but was not *prime quality*. In this respect the case differs from the preceding. There the *kind* of commodity was different; here only the *quality*. The court applied the same rule, and held the writing to be a warranty that the article was of the quality described. So, in *Yates v. Pym*, 6 Taunt. 446, the article was described in the sale note as "58 bales of *prime singed* bacon." It was held to amount to a warranty that the bacon was *prime singed*. *Osgood v. Lewis*, 2 Harr. & Gill. 495, supports the same view; in that case the words in the bill of parcels were, "winter pressed sperm oil." This was considered as a warranty that the oil was winter pressed. So in *The Richmond Trading & Co. v. Farquar*, 8 Blackf. 89, it was held, where wool was sold in sacks, and the sacks marked by the seller and described in the invoice as being of a certain quality, that this is an express warranty that it is of such quality. And where a vessel was advertised for sale as being "copper fastened," this was held to be a warranty that she was so, according to the understanding of the trade. *Shepherd v. Kain*, 5 B. & Ald. 240. See *Paton v. Duncan*, 3 C. & P. 336; *Teesdale v. Anderson*, 4 C. & P. 198; *Wilson v. Backhouse*, Peake's Add. Cas. 119.—So in Pennsylvania it is held, that in a sale of goods described in a bill or sold note, there is an implied warranty that the commodity sold is the same *in specie* as the description given of it in the bill. *Borrekins v. Bevan*, 3 Rawle, 23. But the courts of that State refuse to extend the same doctrine to a statement of *quality* of the articles sold. Therefore, where the article was described in the bill of sale as "*superior sweet-scented Kentucky leaf tobacco*,"

the seller was held not liable on a warranty, if the tobacco was Kentucky leaf, though of a very low quality, ill-flavored, unfit for the market, and not sweet-scented. *Frale v. Bispham*, 10 Barr, 320. And see *Jennings v. Gratz*, 3 Rawle, 168. See also *Hyatt v. Boyle*, 5 Gill & Johns. 110. A contract for "good fine wine" has been held to import no warranty, these words being too uncertain and indefinite to raise a warranty. *Hogins v. Plymton*, 11 Pick. 97. A warranty that certain oil "should stand the climate of Vermont without chilling," means that the oil will not chill, when used in Vermont, in the ordinary manner lamp oil is used. *Hart v. Hammett*, 18 Verm. 127. So a bill of sale describing the article sold simply as "tallow," raises no implied warranty that the tallow should be of good quality and color. *Lamb v. Crafts*, 12 Met. 353. And in a bill of sale of "certain lots of boards and dimension stuff now at and about the mills at P.," there is no implied warranty that the boards are *merchantable*. *Whitman v. Freese*, 23 Maine, 212. A bill of sale of a negro described her as "being of sound wind and limb and free from all disease." Held, an express warranty that she was sound. *Cramer v. Bradshaw*, 10 Johns. 484. But a bill of sale of a horse, as follows:—"T. W. bought of E. R. one bay horse, five years old last July, *considered sound*," signed by the vendor, creates no warranty of the soundness of the horse. *Wason v. Rowe*, 16 Verm. 525. See also *Towell v. Gatewood*, 2 Scammon, 22; *Baird v. Matthews*, 6 Dana, 129. So in *Winsor v. Lombard*, 18 Pick. 57, the bill of sale described the article as so many "barrels No. 1 mackerel, and so many barrels No. 2 mackerel." The mackerel sold were in fact branded by the inspector as No. 1 and No. 2. It was held there was no implied warranty that they were *free from rust* at the time of sale, although it was proved that mackerel affected by rust are not considered No. 1 and No. 2. But the general doctrine of this note was expressly recognized by *Shaw, C. J.*, who said:—"The rule being, that upon a sale of goods by a written memoran-

"beware," or should take care to ascertain for himself the quality of the thing he buys, becomes utterly unreasonable, under circumstances which make such care impossible. If, therefore, the seller alone possesses the requisite knowledge, or the means of knowledge, and offers his goods for sale under circumstances which compel the purchaser to rely upon the judgment and honesty of the seller, without any examination on his own part as to the quality of the thing offered, it has been held that the rule of *caveat emptor* does not apply, because it cannot apply, and that the seller warrants that the goods he offers for sale are in respect to their qualities what the purchaser may fairly understand them to be; in other words, that they are of merchantable value, and proper subjects of trade. (q)

It might seem that the reason of this rule should apply to all cases where an article is sold of which the value is materially affected by some defect which the buyer cannot know

dum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described, this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold." In some early cases in America, it was held that the description given to property in advertisements, bills of sale, sold notes, &c., did not enter into the contract, and therefore being but matters of description, created no warranty. Such are the cases of *Seixas v. Woods*, 2 Caines, 48; *Barrett v. Hall*, 1 Aikens, 269; *Sweet v. Colgate*, 20 Johns. 196, and some others; but we think the more modern cases have decided that a rule of law, in itself sound, was in those instances erroneously applied. See *Henshaw v. Robins*, 9 Met. 83, and 2 Kent's Com. 489. See also the valuable notes to *Chandelor v. Lopus*, 1 Smith's Lead. Cas. 76, *et seq.*, where will be found an able examination of the whole subject of warranty.

(q) *Hanks v. McKee*, 2 Litt. 227. *Gardiner v. Gray*, 4 Camp. 144, is the leading case upon this point. In that case Lord *Ellenborough*, speaking to this point, says:—"I am of opinion that under such circumstances the purchaser has a right to expect a salable article answering the description in the con-

tract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to place them on a dunghill." See also the case of *Gallagher v. Waring*, 9 Wend. 20, where the court were inclined to extend the rule to the case of a sale of cotton in bales, lying in the storehouse of the vendor, situate in the place where both vendor and vendee resided, notwithstanding that the vendor had no better opportunity than the vendee for the inspection of the article. The case of *Hyatt v. Boyle*, 5 Gill & Johns. 110, also holds that the rule of *caveat emptor* does not apply, if the buyer has no opportunity to inspect the goods, and in such case the seller impliedly warrants them to be merchantable. But the mere fact that the examination is attended with inconvenience to the purchaser is not sufficient to dispense with the rule. It must be morally impracticable.

or discover. But it is not yet conceded that in all such cases there is an implied warranty. The implication does not *appear to extend to cases where an examination would be fruitless, but only to those in which there can be no examination. It is true, that in the fluctuation which has marked the course of adjudication on the subject of warranty with sale there is a series of cases, in which, for a considerable time, a principle seemed to be acquiring favor, which was almost equivalent to a rule that every sale carried with it an implied warranty of the merchantable quality of the goods sold. Of course such a rule would in fact annul that of *caveat emptor*. But of late the courts seem to be retracing their steps; and, in this country at least, we consider the ancient rule as distinctly established. (r) There are but two of our States in which it is an acknowledged rule of law that a sale of a chattel for a full price carries with it an implied warranty. And in one of these the civil law, of which this is a principle, prevails. (s)

If goods are sold by sample, there can be no examination of the goods, but there may be of the sample. There is, therefore, an implied warranty that the goods correspond to the sample. (t) But if they do correspond, and the sample

(r) The weight of authority decidedly determines that a sale for a sound price implies no warranty of quality, or that the article is merchantable. *Dean v. Mason*, 4 Conn. 428, an able case on this subject; *Holden v. Dakin*, 4 Johns. 421; *Snell v. Moses*, 1 Johns. 96; *Johnston v. Cope*, 3 Harr. & Johns. 89; *Cozins v. Whitaker*, 3 Stew. & Port. 322; *La Neuville v. Nourse*, 3 Camp. 351; *West v. Cunningham*, 9 Port. 104.

(s) South Carolina and Louisiana alone, of American States, hold that a sale of a *chattel* for a sound price creates a warranty against all faults known or unknown to the seller. *Tinrod v. Shoolbred*, 1 Bay, 324; *Deweese v. Morgan*, 1 Martin, 1; *State v. Gaillard*, 2 Bay, 19; *Barnard v. Yates*, 1 N. & McC. 142; *Missroon v. Waldo*, 2 N. & McC. 76; *Melançon v. Robichaux*, 17 Louisiana, R. 97. But this does not extend to sales of real estate. *Rupart v. Dunn*, 1 Richardson, 101. And in sales of personal property, if the buyer

is informed fully of all the circumstances, and has a fair opportunity of informing himself, he is bound by his contract, although it be a losing one. *Whitefield v. McLeod*, 2 Bay, 380. And see *Carnochan v. Gould*, 1 Bailey, 179; *Rose v. Beatie*, 2 N. & McC. 538. And if the parties expressly agree that the buyer shall take the property at his own risk, the vendor is not answerable for its soundness. *Thompson v. Lindsay*, 3 Brev. 305. And a sound price does not imply a *value* of the property equal to the price, but only that there is no unsoundness. And such unsoundness must materially affect the article. *Smith v. Rice*, 1 Bailey, 648.

(t) *Bradford v. Manly*, 13 Mass. 139, a leading case in America upon this point. *Oneida Manuf. Co. v. Lawrence*, 4 Cow. 440; *Andrews v. Kneeland*, 6 Cow. 354; *Gallagher v. Waring*, 9 Wend. 20; *Beebee v. Robert*, 12 Wend. 413; *Boorman v. Jenkins*, 12 Wend. 566; *Moses v. Mead*, 1 Denio,

itself has a defect, even if this defect be unknown, and not discoverable by examination, there is no implied warranty against this defect, and the seller is not responsible. (u) If there be an express warranty, an examination of samples is no waiver of the warranty; nor is any inquiry or examination into the character or quality of the things sold; for a man has a right to protect himself by such inquiry, and also by a warranty. (uu)

If a thing be ordered of the manufacturer for an especial purpose, and it be supplied and sold for that purpose, there

386; *Borrekins v. Bevan*, 3 Rawle, 37; *Rose v. Beatie*, 2 N. & McC. 538; *Beirne v. Dord*, 2 Sandf. 89, an excellent case upon this point. It is there held that in order to constitute a sale by sample, it must appear that the parties contracted solely in reference to the sample, or article exhibited, and that both mutually understood they were dealing with the sample, and with an understanding that the bulk was like it. And in the same case upon appeal, 1 Selden, 95, and in *Hargous v. Stone*, 1 Selden, 73, it is decided that the mere exhibition of a sample is not sufficient to constitute a warranty that the bulk of the goods is of the same quality with the sample, that such exhibition is but a representation that the sample has been fairly taken from the bulk of the commodity, and that for the production of the sample to have the effect of a strict warranty it must be shown that the parties mutually understood that there was an agreement on the part of the seller that the bulk of the commodity should correspond with the sample.—An opportunity for a personal examination of the bulk is a strong circumstance against considering the sale to have been made by sample. *Hargous v. Stone*, 1 Seld. 73; *Beirne v. Dord*, 1 Seld. 95. See also *Waring v. Mason*, 18 Wend. 434. In *Williams v. Spafford*, 8 Pick. 250, a leather bag of indigo was sold, which the bill of sale described as “one seroon of indigo.” There was a small triangular hole on one side of the seroon, where the purchaser might draw out a specimen, and at the sale the plaintiff examined the article in this mode. The seroon proved to be mainly filled with other substances than indigo. It was held a sale “by sample,” and that there was a warranty that the bulk was

of the same kind and quality with the sample. In *Salisbury v. Stainer*, 19 Wend. 159, several bales of hemp were sold. The purchaser was told to examine the hemp for himself. He cut open one bale, and appeared satisfied with the quality. He might have cut open every bale, had he chosen to do so. It was proved that the interior of the bales consisted of tow, and of a quality of hemp very much inferior to that on the outside of the bales. This was held not to be a sale by sample, and that there was no warranty that the interior should correspond with the exterior of the bales.

(u) *Parkinson v. Lee*, 2 East, 314; a very important case upon this subject, which has been much discussed, and sometimes doubted, but which, when properly understood, seems to be well supported by principle and analogy. It was a sale of five pockets of hops, with express warranty that the bulk answered the samples by which they were sold. The sale was in January, 1801; at that time the samples fairly answered to the commodity in bulk, and no defect was at that time perceptible to the buyer. In July following every pocket was found to have become unmerchantable and spoiled, by heating, caused probably by the hops having been fraudulently watered by the grower, or some other person, before they were purchased by the defendant. The defendant knew nothing of this fact at the time of sale, and it was then impossible to detect it. It was held that there was here no implied warranty that the bulk of the commodity was merchantable at the time of sale, although a merchantable price was given.

(uu) *Willings v. Consequa*, Pet. C. C. 301.

is an implied warranty that it is fit for that purpose. (v)
 * This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special

(v) *Beals v. Olmstead*, 24 Verm. 114. *Jones v. Bright*, 5 Bing. 533, is the leading English case on this subject. There the defendant was a *manufacturer* and vendor of copper. The plaintiff applied to him "for copper for sheathing a vessel." The defendant said: "I will supply you well." From the defendant's warehouse the plaintiff's agent then selected such copper as was wanted, and applied it to plaintiff's vessel. It proved to be very defective, and lasted only about four months, in place of four years, the usual time of wear of good sheathing; the jury found that the decay was caused by some intrinsic defect in the quality of the copper, but that there was no satisfactory evidence of what the defect was. No fraud was imputed to the defendant. After full argument and deliberation, it was *held* by the whole Court of Common Pleas that there was an implied warranty that the article was fit for the purpose for which it was sold. See also *Brenton v. Davis*, 8 Blackf. 317. *Laing v. Fidgeon*, 6 Taunt. 108, is also an important case. The defendant was a saddle manufacturer. He sent the plaintiff a sample of saddles that could be made for a certain price. The plaintiff then gave him an order for "goods for North America, 3 dozen single flap saddles, 24s. a 26s. with cruppers, &c." The saddles delivered were inferior in material and workmanship, useless and *unmerchantable*, and did not correspond with the sample sent. The court *held* the whole transaction to amount to a contract that the article should be merchantable, and the plaintiff had judgment. *Brown v. Edgington*, 2 M. & Gr. 279, also deserves attention. The defendant was a dealer in ropes, and represented himself to be a manufacturer of the article. The plaintiff, a wine merchant, applied to him for a crane rope. The defendant's foreman went to the plaintiff's premises, in order to ascertain the dimensions and kind of rope required. He examined the crane and the old rope, and took the necessary admeasurements, and was told that the new rope was wanted for the purpose of raising pipes of wine out of the cellar, and letting them down into the street; when he informed the

plaintiff that a rope must be made on purpose. The defendant did not make the rope himself, but sent the order to his manufacturer, who employed a third person to make it. It was *held* that, as between the parties to the sale, the defendant was to be considered as the manufacturer, and that there was an implied warranty that the rope was a fit and proper one for the purpose for which it was ordered. *Tindal, C. J.*, said:—"It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed." In *Shepherd v. Pybus*, 3 M. & Gr. 868, it was *held* that in a sale of a barge by the *builder*, there was an implied warranty that it was reasonably *fit for use*, but it was left undetermined whether there was an implied warranty that the barge was fit for some *particular* purpose, for which the builder knew it was designed by the purchaser. See, also, *Chambers v. Crawford*, Addison, 150, that a boat-builder, constructing a boat, is held to warrant it sufficient for *ordinary use*.—In *Ollivant v. Bayley*, 5 Q. B. 288, the plaintiff was patentee and manufacturer of a patent machine for printing in two colors. The defendant saw the machine on the plaintiff's premises, and ordered one, the plaintiff undertaking by a written memorandum to make him "a two color printing machine on my patent principle." In an action for the price, the defendant excused himself from liability on the ground that the machine had been found useless for printing in two colors. The judge, in summing up, told the jury that, if the machine described was a known, ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not; but that if it was not a known,

purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose. For if the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose. But where he orders a thing for a special purpose, or to do a specific work, there he puts this risk upon the person who is to supply the thing. (*w*)

ascertained article, and the defendant had merely ordered, and the plaintiff agreed to supply, a machine for printing two colors, the defendant was not liable unless the instrument was reasonably fit for the purpose. The Court of Queen's Bench held this to be a proper direction; and, the jury having found for the plaintiff under it, they refused to disturb the verdict. See, also, the next note. In *Barnett v. Stanton*, 2 Ala. 195, it was determined that if manufactured goods are open to inspection, and are actually examined by the purchaser, before the sale, there is no implied warranty of quality, although the manufacturer himself be the vendor. See *Kirk v. Nice*, 2 Watts, 367, that a manufacturer even does not always undertake that the goods made are merchantable. The principle of the text, and the distinction between a sale of a manufactured article by the manufacturer himself, and of an ordinary sale of a chattel, as to implied warranty, is recognized in *Misner v. Granger*, 4 Gilman, 69; and in *Leflore v. Justice*, 1 S. & M. 381, where it is said that every person who contracts to do a piece of work, impliedly undertakes to apply sufficient skill and dexterity to its performance to complete it in a just and workmanlike manner. So in *Howard v. Hoey*, 23 Wend. 351, the distinction between manufactured articles and others is recognized. See, also, *Hart v. Wright*, 17 Wend. 267, 18 Id. 449.

(*w*) "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable." *Maule*, J., in *Keates v. Cadogan*, 2 E. L. & E. R. 320. See also *Chanter v. Hopkins*, 4 M. & W. 399, which fully establishes the distinction taken in the

text, and is a leading case on the subject. There the defendant sent to the plaintiff, the patentee of an invention, known as "Chanter's smoke-consuming furnace," the following written order:—"Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right, £15 15s.; ironwork not to exceed £5 5s.; engineer's time fixing, 7s. 6d. per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of brewery, and was returned to the plaintiff. It was held, (no fraud being imputed to the plaintiff,) that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole £15 15s., the price of the patent right. *Bluett v. Osborne*, 1 Stark. 384, supports this distinction. In that case the plaintiff sold the defendant a bowsprit. It appeared at the time to be in every respect good and perfect. The defendant had ample opportunity to inspect it. Soon after, the bowsprit was cut up and found to be rotten. The defendant resisted payment, on the ground that there was an implied warranty by the vendor that the article should be made of good and sufficient materials. No fraud was attributed to the vendor. The defence was not sustained, and the plaintiff had a verdict for the whole price. Here there was a sale of a *specific* chattel—intended, it is true, for a particular purpose by the purchaser, but not furnished or made for that purpose by the vendor. See also *Gray v. Cox*, 4 B. & C. 108; *Dickson v. Jordan*, 11 Ired. 166; *Burns v. Fletcher*, 2 Cart. (Ind.)

But whatever may be the law as to an implied warranty that personal property bought and sold, or ordered and manufactured for a particular purpose, shall be reasonably fit for such a purpose,—no such rule applies to real estate. It seems, indeed, to be quite well settled, that in a lease or purchase of a house and land, there is no implied warranty that it shall be reasonably fit for habitation, occupation, or cultivation; still less that it shall be fit for the purpose for which it was taken. (x)

372.—It has been very generally supposed that in all sales of provisions there is an implied warranty that they are wholesome. But it seems now to be well settled that such implied warranty must be confined to those cases where provisions are sold for immediate domestic use. *Moses v. Mead*, 1 Denio, 378. And it seems not to matter that they are *purchased* for domestic use, unless they were *exposed to sale* for that purpose, or the seller was a *provision dealer*. *Burnby v. Bollett*, 16 M. & W. 644. In this case A., a farmer, bought, in the public market of a country town, from B., a butcher keeping a stall there, the carcase of a dead pig for consumption, and left it hanging up, intending to return after completing other business and take it away. In his absence, C., a farmer, seeing it and wishing to buy, was referred to A. as the owner, and subsequently, on the same day, bought it of A., the original buyer, without any warranty. It did not appear that any secret defect in it was known to any of the parties. It turned out to be unsound, and unfit for human consumption. It was *held* that no warranty of soundness was implied by law between the farmers A. and C. See also *Van Bracklin v. Fonda*, 12 Johns. 468; *Emerson v. Brigham*, 10 Mass. 197; *Hart v. Wright*, 17 Wend. 267, 18 Id. 449; *Winsor v. Lombard*, 18 Pick. 57; *Humphreys v. Comline*, 8 Blackf. 508.—If an innkeeper agree with a brewer to take all his beer of him, he is bound to furnish him with beer of a wholesome quality. *Holcombe v. Hewson*, 2 Camp. 391; *Coope v. Twibill*, 3 Camp. 286.

(x) *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, 12 M. & W. 52, where the subject is very ably examined and discussed. In the last

case, A. hired in writing the estate of twenty-four acres of land from B. for seven months at a rent of £40, and stocked the lands with beasts, several of which died a few days afterwards, from the effect of a poisonous substance which had been accidentally spread over the land without B.'s knowledge. *Held* that A. could not abandon the land for breach of an implied contract in B., but continued liable for the whole rent. These decisions may be in conflict with, and if so, doubtless overrule, the case of *Smith v. Marrable*, 11 M. & W. 5, where it was held that in a lease of a house and furniture for a temporary residence at a watering place, and where the furniture formed the greater part of the consideration of the contract, there was an implied warranty that the house and furniture should be fit for the purpose for which it was hired; and Lord Abinger, in *Sutton v. Temple*, attempted to distinguish the two cases. The other judges, however, were inclined to think, both in *Sutton v. Temple*, and *Hart v. Windsor*, that *Smith v. Marrable* could not be supported. And the same may be said of *Edwards v. Etherington*, Ry. & M. 268, 7 D. & R. 117; *Collins v. Barrow*, 1 M. & Rob. 112; *Salisbury v. Marshal*, 4 C. & P. 65. The doctrine of the text is sustained also in two recent cases in Massachusetts. Thus, in *Dutton v. Gerrish*, 4 Law Reporter, N. S. 516, the defendant being the owner of a store, in April, 1849, leased the same to the plaintiffs, who filled it with dry goods. In June, 1849, the roof and walls of the store fell in, and buried the plaintiff's goods in the ruins; and to recover the price of these goods the plaintiffs brought their action. The lease of the plaintiffs contained no express warranty that the building was fit for a dry

No warranty can be implied from circumstances, if there be an express refusal to warrant. (y) And where the contract of sale is in writing, and contains no warranty, there parol evidence is not admissible to add a warranty. (z) And *if there be a warranty in writing, it cannot be enlarged or varied by parol evidence. (a) But although there be a writing between the parties, if it does not amount to a contract of sale, as if it be an ordinary bill of sale, merely intended as an acknowledgment of the receipt of the price, then it seems that parol evidence is admissible to show the actual terms of the sale, and that there was a warranty. (aa)

goods warehouse, or for any other purpose. The plaintiffs disclaimed any imputation of fraud or misrepresentation on the part of the defendant. The court held that as the lease contained no express warranty, the plaintiffs could not recover, there being no warranty implied in law on the part of the lessor of real estate, that it is fit or suitable for the purposes for which it is leased or occupied. They also held that decisions in reference to leases of furnished lodgings, and to warranties implied upon the sale of goods, were not applicable to this case. The same doctrine is held in *Foster v. Peyser*, 5 Law Reporter, N S. 155. See, also, the learned note to this last case, where the authorities on this point are reviewed. See, also, *ante*, p. 422, n. (y.)

(y) *Rodrigues v. Habersham*, 1 Spears, 314. See also *Bywater v. Richardson*, 1 Ad. & El. 508; *Atkins v. Howe*, 18 Pick. 16.

(z) This was distinctly adjudged in *Van Ostrand v. Reed*, 1 Wend. 424. It rests upon the familiar principle that the writing is supposed to contain all the contract. *Reed v. Wood*, 9 Verm. 285; *Mumford v. McPherson*, 1 Johns. 414; *Wilson v. Marsh*, 1 Johns. 503; *Lamb v. Crafts*, 12 Met. 353; *Dean v. Mason*, 4 Conn. 432; *Randall v. Rhodes*, 1 Curtis, 90.

(a) *Kain v. Old*, 2 B. & C. 634; *Pickering v. Dowson*, 4 Taunt. 779; *Pender v. Fobes*, 1 Dev. & Batt. 250; *Smith v. Williams*, 1 Murph. 426. — So, an express warranty will not be extended by implication from other parts of the contract in which it occurs. *Dickson v. Zizinia*, 2 E. L. & E. 314. In this case the declaration stated

that the defendants sold to the plaintiff a cargo of corn then shipped at Orfano on board the O., at a certain price, including freight to Cork, Liverpool, or London; that it was agreed that the quality should be of a certain average, and that the corn had been shipped on board in good and merchantable condition. Breach, that it was not shipped in good and merchantable condition for the performance of the said voyage. Held, that it was a misdirection to ask the jury whether the corn was good and merchantable for a foreign voyage. And *Maule, J.*, said: — "It would be most mischievous to superadd a tacit condition relating to a circumstance provided for by the express words of the parties. If a man sold a horse and warranted it sound, and the vendor knew that it was intended to carry a lady, and the horse was sound, but was not fit to carry a lady, there would be no breach. So, with respect to any other warranty, the maxim to be applied is, '*expressum facit cessare tacitum.*' Were the law otherwise, it would very much infringe on the liberty of parties making contracts. It would in such case be necessary to express that it is not intended to go beyond the language employed."

(aa) *Allen v. Pink*, 4 M. & W. 140; *Hersom v. Henderson*, 1 Foster, 224; *Hogins v. Plympton*, 11 Pick. 97; *Bradford v. Manly*, 13 Mass. 142. — So, parol proof is admissible to show a usage of trade as to the mode of making sales, the written memorandum and bought and sold note being silent upon the subject. *Boorman v. Jenkins*, 12 Wend. 567. And to prove that the vendor informed the vendee at the time of sale of

Ships often are, and any property may be, sold "with all faults." This is an emphatic exclusion of all warranty. But it gives the seller no right to commit a fraud, nor will it prevent the sale from being avoided on proof of fraud. And it is fraud if the seller conceals existing faults, and draws the attention of the buyer away so as to prevent his discovering them, or places the property in such circumstances that discovery is impossible, or made very difficult. (b)

*There has been much question as to what is a breach of the warranty of soundness; and what are the rights and remedies of a party who bought with warranty, which warranty has been broken. For an answer to the first question we will refer to the definitions and illustrations in our notes. (c)

the defect complained of. *Schuyler v. Russ*, 2 Caines, 202.

(b) *Baglehole v. Walters*, 3 Camp. 154, is a leading case on this subject. It was there *held*, that if a ship is sold "with all faults," the seller is not liable for latent defects, *which he knew of*, but did not disclose at the time of sale, *unless he used some artifice to conceal them from the purchaser*. The case of *Mellish v. Motteau*, Peake, 115, where a contrary rule was adopted by Lord *Kenyon*, was cited, but Lord *Ellenborough* said:—"I cannot subscribe to the doctrine of that case." See also *Pickering v. Dowson*, 4 Taunt. 785. The doctrine of the text was laid down by *Mansfield, C. J.*, in *Schneider v. Heath*, 3 Camp. 508. A ship was sold, "to be taken with all faults." Her bottom was worm-eaten, and her keel broken. When the ship was advertised for sale, the captain took her from the ways and kept her constantly afloat, so that these defects were completely concealed by the water. This was *held* to be a fraud upon the purchaser, and the sale was avoided. A similar principle was applied in *Fletcher v. Bowsher*, 2 Stark. 561, where a vendor of a ship represented her to have been built in 1816, when she had in fact been launched the year before. She was sold "with all faults, as they now are, without any allowance for any defect whatsoever." The sale was *held* void. But in all these cases actual fraud in the vendor must be proved in order to render him liable. See *Freeman v. Baker*, 5 B. & Ad. 797; *Early v. Garrett*, 9 B. & C. 928. As

to the construction of contracts of the kind mentioned in the text, see *Freeman v. Baker*, *supra*; *Shepherd v. Kain*, 5 B. & Ald. 240; *Taylor v. Bullen*, 1 E. L. & E. 472.

(c) The question has been often raised, what is soundness or unsoundness in a horse or other animal, sold with a warranty of soundness. The subject was ably examined in *Kiddell v. Burnard*, 9 M. & W. 668. *Parke, B.*, there said:—"The rule as to unsoundness is, that if at the time of sale the animal has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the usefulness of the animal; or if he has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effect will diminish his natural usefulness, such animal is unsound." See also *Coates v. Stephens*, 2 M. & Rob. 157; *Elton v. Jordan*, 1 Stark. 127; *Elton v. Brogden*, 4 Camp. 281. So if a horse has at the time of sale *the seeds of disease*, which in its ordinary progress will diminish his natural usefulness, this is unsoundness. *Kiddell v. Burnard*, 9 M. & W. 668. But a temporary and curable injury, although existing at the time of sale, *if it does not injure the animal for present service*, is not an unsoundness. *Roberts v. Jenkins*, 1 Foster, 116. It seems to be immaterial whether the injury be permanent or temporary, curable or incurable.

On the second point, it may be gathered from the somewhat conflicting authorities, first, that the buyer may bring his action at once, founding it upon the breach of warranty, without returning the goods; but his continued possession *of the goods and their actual value would be considered in estimating the damages. (d) Secondly, he may return the goods forthwith, and if he does so without unreasonable de-

ble, if it render the animal less fit for present usefulness and convenience. *Roberts v. Jenkins, supra*; *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. 127; *Kornegay v. White*, 10 Ala. 225. But see *Garment v. Barrs*, 2 Esp. 673. *Roaring* has been held to be an unsoundness. *Onslow v. Eames*, 2 Stark. 81; *contra, Bassett v. Collis*, 2 Camp. 523. But "*crib-biting*" has been held not to be an unsoundness. *Broenenburgh v. Haycock*, Holt, N. P. 630. If not an unsoundness, it is a "vice," and if a horse is warranted free from vice, it is a breach of the warranty. *Paul v. Hardwick*, Chitty on Cont. 403, n. (r.) A "bone-spavin" is an unsoundness. *Watson v. Denton*, 7 C. & P. 85. A *nerved* horse is unsound. *Best v. Osborne, Ry. & M.* 290. But a defective formation, or badness of shape, which has not produced lameness at the time of sale, although it may render the horse liable to become lame at some future time, (e. g. "*curby hocks*,") is not an unsoundness. *Brown v. Elkington*, 8 M. & W. 132. See also *Dickinson v. Follett*, 1 M. & R. 299. The "*navicular disease*" is an unsoundness. *Matthews v. Parker*, Oliphant's Law of Horses, 228. So of "*thickwind*." *Alkinson v. Horridge*, Id. 229. "*Ossification of the cartilages*." *Simpson v. Potts*, 224. The question of soundness or unsoundness is particularly for the jury; and the court will not set aside a verdict on account of a preponderance of the testimony the other way. *Lewis v. Peake*, 7 Taunt. 153.

(d) *Fielder v. Starkin*, 1 H. Bl. 17, a leading case upon this point. A neglect to inform the vendor of the discovered breach of the warranty for several months after the sale, will not bar the purchaser's right to an action for breach of warranty. *Pateshall v. Tranter*, 3 Ad. & El. 103. *Rutter v. Blake*, 2 H. & Johns. 353, is a strong American case, that an action may be maintained

for breach of warranty without returning the goods, but it was here held that the purchaser ought to give the vendor notice where the goods were deposited. In *Kellogg v. Denslow*, 14 Conn. 411, where the authorities are very elaborately and critically examined by *Sherman, J.*, the rule of the text is adopted. There A. agreed to furnish B. with sundry articles of machinery, to be delivered subsequently, and to be free from defect. A. delivered the articles accordingly, which were received and used by B. for nearly a year, without notice to A. of any defects therein. In an action brought by B. against A. on the warranty, claiming damages for defects in the articles at the time of delivery, it was held that the effect of B.'s not having given notice of such defects in a reasonable time, was, that he had thereby affirmed the contract, but such omission constituted no defence to the action, which assumed the subsistence of the contract. See also *Waring v. Mason*, 18 Wend. 425; *Thompson v. Botts*, 8 Missouri, 710; *Borrekins v. Bevan*, 3 Rawle, 23; *Cozzins v. Whitaker*, 3 Stew. & Port. 322; *Carter v. Stennel*, 10 B. Monroe, 250; *Parker v. Pringle*, 2 Strobhart, 242; *Milton v. Rowland*, 11 Ala. 732; *Ferguson v. Oliver*, 8 S. & M. 332. The weight of modern authority is decidedly in favor of the rule of the text, that an action lies for breach of a warranty, express or implied, without returning the property, or giving any notice of the defect. In *Hills v. Bannister*, 8 Cow. 31, A. sold B. a bell, warranting it not to crack within a year, and promising to recast it if it did. He was held not liable on his warranty, without notice, and neglect to recast it. Of course, if the purchaser has not returned the goods, their real value will be deducted from his damages; the difference between the price paid, or to be paid, and the real value, being the measure of damages.

lay, this will be a rescinding of the sale, and he may sue for the price if he has paid it, or defend against an action for the price, if one be brought by the seller. And if the vendor refuses to receive the goods back, when tendered, the purchaser may sell them; and if he sells them for what they are reasonably worth, and within a reasonable time, he may recover of the vendor the loss upon the resale, with the expense of keeping the goods and of selling them. (*dd*) We should say, on the reason of the thing, that if the buyer sells the goods with all proper precautions as to time, place, and manner, to ensure a fair sale, the vendor will be bound by the price the goods bring, whether that be in fact equal to their value or not; but this may not yet be established by adjudication. If he has a right to return the goods, his tender of them completes his right to sue for the price, whether the vendor receives them or not. (*e*) But some authorities of great weight limit his right to return the goods for breach of warranty to cases of fraud, or where there was an express agreement to that effect between the parties. (*f*)

* In general, when a buyer asserts that the goods he purchased are not what they were warranted to be, or are so different from what he ordered, or from the seller's representation of them, or from the quality and value such articles should possess, as to give him a right to rescind and avoid the sale, he must forthwith return the goods if he would exercise this right. Delay in doing so, or any act equivalent

Caswell *v.* Core, 1 Taunt. 566; Germaine *v.* Burton, 3 Stark. 32; Cary *v.* Gruman, 4 Hill, 625; Voorhees *v.* Earl, 2 Hill, 288; Comstock *v.* Hutchinson, 10 Barb. 211.

(*dd*) *Chesterman v. Lamb*, 2 Ad. & El. 129; *McKenzie v. Hancock*, Ry. & Mood. 436; *Maclean v. Dunn*, 4 Bing. 722; *Best, C. J.*; *Woodward v. Thacher*, 21 Verm. 580; *Buffington v. Quantin*, 17 Penn. 310.

(*e*) *Washington, J.*, in *Thornton v. Wynn*, 12 Wheat. 193.

(*f*) See *Carter v. Walker*, 2 Richardson, 40. This is the rule in New York. *Cary v. Gruman*, 4 Hill, 625; *Voorhees v. Earl*, 2 Hill, 288. In Kentucky,

Lightburn v. Cooper, 1 Dana, 273, in the United States Courts, *Thornton v. Wynn*, 12 Wheat. 183. In Pennsylvania, *Kase v. John*, 10 Watts, 107. In Tennessee, *Allen v. Anderson*, 3 Humph. 581. It has been said this is the English rule. See *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Parson v. Lexton*, 4 C. B. 899; *Ollivant v. Bayley*, 5 Q. B. 288; *Dawson v. Collis*, 4 Eng. Law & Eq. 338. And in an action brought for the price of goods sold or services performed, the defendant may reduce the damages by showing a breach of warranty on the part of the plaintiff. *Allen v. Hooker*, 25 Verm. 137.

to acceptance, employment, or disposition of the goods, after he knows or should know their deficiency, if it exists, would be construed either into an admission that there was no such deficiency, or into a waiver of his right to rescind the sale because of such deficiency. (g)

(g) Thus, in *Milner v. Tucker*, 1 C. & P. 15, a person contracted to supply a chandelier, sufficient to light a certain room. The purchaser kept the chandelier six months, and then returned it; he was held liable to pay for it, although it was not according to the contract. So in *Cash v. Giles*, 3 C. & P. 407, a threshing machine was kept several years, without complaint, but only used twice; the vendee was held liable for the price, although it was of little or no value. And in *Percival v. Blake*, 2 C. & P. 514, keeping property two months without objection was held to be an ac-

ceptance, and the purchaser was bound to pay for it, there being no fraud. See *Grimaldi v. White*, 4 Esp. 95; *Groning v. Mendham*, 1 Starkie, 257; *Hopkins v. Appleby*, 1 Starkie, 477; *Kellogg v. Denslow*, 14 Conn. 411. Keeping a warranted article for a length of time without objection, and selling part, is evidence tending to prove that it corresponded with the warranty. *Prosser v. Hooper*, 1 Moore, 106. But the delay must take place after the discovery of the deficiency in the goods. *Clements v. Smith's Administrators*, 9 Gill, 156.

CHAPTER VI.

STOPPAGE IN TRANSITU.

If a vendor, who has sent goods to a purchaser at a distance, finds that the purchaser is insolvent, he may stop the goods at any time before they reach the purchaser. This right is called the right of stoppage *in transitu*.

This right exists, strictly speaking, only when the vendor has parted with the goods. If they have never left his possession, he has a lien on them for the full payment of their price; but not this right of stoppage. (*h*)

Insolvency is necessary to create this right; but it is not perfectly well settled what constitutes, for this purpose, insolvency. It would seem, however, that it should be not merely a general inability to pay one's debts; but the having taken the benefit of an insolvent law, or a stoppage of payment, or a failure evinced by some overt act. (*i*) Or, as it

(*h*) *Parks v. Hall*, 2 Pick. 212. As to the difference between these rights, see *McEwan v. Smith*, 2 House of Lords Cases, 309. See also *Gibson v. Carruthers*, 8 M. & W. 321; *Jones v. Bradner*, 10 Barb. 193.

(*i*) In *Rogers v. Thomas*, 20 Conn. 54, *Storrs, J.*, on the meaning of the phrase insolvency, said:—"The cases on this subject generally mention insolvency as one of the conditions on which the right of stoppage *in transitu* accrues; but they are wholly silent as to what constitutes such insolvency; and therefore its sense, as thus used, is to be gathered from the circumstances of the cases. For it is a term which is used with various meanings. In a technical sense it denotes the having taken the benefit of an insolvent law; in the popular sense, a general inability to pay debts; and in a mercantile sense, a stoppage of payment, or failure in one's

circumstances, as evinced by some overt act. That a technical insolvency is sufficient to authorize the exercise of the right of stoppage *in transitu* has always been conceded. That it is not indispensable for that purpose is equally clear. Mr. Smith, in his *Compendium of Mercantile Law*, p. 549, n., expresses his belief that merchants have very generally acted as if the right to stop goods was not postponed till the occurrence of insolvency in the technical sense, and pertinently adds:—"The law of stoppage *in transitu* is as old, it must be recollected, as 1670, on the 21st of March, in which year *Wiseman v. Vandeput* was decided; so that if *insolvency* is to be taken in a technical sense, the law of stoppage *in transitu* has been varying with the varied enactments of the legislature regarding it." That stoppage of payment amounts to insolvency for this purpose is assumed in many of the

has been defined, "an inability to pay one's debts in the ordinary course as persons generally do." (*j*)

The mere insolvency or bankruptcy of the vendee will not, *per se*, amount to a stoppage *in transitu*; for there must be some act on the part of the consignor, indicative of his intention to repossess himself of the goods. (*k*) But if it was ever considered necessary for the consignor, or some one in his behalf, to take actual possession of the goods, in order to perfect and execute his right, that doctrine is now exploded. Notice of the consignor's claim and purpose given to the carrier before delivery is sufficient. (*l*) This notice and de-

cases. Lord *Ellenborough*, in *Newson v. Thornton*, 6 East, 17, places the right of the vendor to stop the property on the 'insolvency' of the consignee, where there had been only a stoppage of payment by the vendee, when notice was given to the carrier, by the vendor, to retain the goods. In *Vertue v. Jewell*, 4 Campb. 31, the terms used were, 'stopped payment.' See also *Dixon v. Yates*, 5 B. & Ad. 313. We have been able to find no case in which the right of stoppage *in transitu* has been either sanctioned or attempted to be justified on the ground of the insolvency of the vendee, where there was not a technical insolvency, or a stoppage of payment, or failure in circumstances, evidenced by some overt act; and Mr. Blackburn, in his *Treatise on the Contract of Sale*, p. 130, where this subject is very minutely examined, says, that there seems to have been no such case; and adds, that although the text-books and *dicta* of the judges do not restrict the use of the term 'insolvent,' or 'failed in his circumstances,' to one who has stopped payment, there must be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril, if the consignee be in fact solvent, it would seem no unreasonable rule to require, that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act. Mr. Smith, in his work which has been mentioned, clearly favors the same view. *Comp. Merc. Law*, 130, n. Hence, it appears that the authorities and text-writers furnish

no support to the claim that a mere general inability to pay debts, unaccompanied with any visible change in the circumstances of the debtor, constitutes insolvency, in such a sense as to confer the right of stoppage *in transitu*." But see *Hays v. Mouille*, 14 Penn. St. R. 51; *Biddlecombe v. Bond*, 4 Ad. & El. 332; *Naylor v. Denni*, 8 Pick. 205; *Chandler v. Fulton*, 10 Texas, 2.

(*j*) *Thompson v. Thompson*, 4 Cush. 134; *Shore v. Lucas*, 3 D. & R. 218; *Bayly v. Schofield*, 1 M. & S. 338.

(*k*) 2 Kent's Com. 543. But the right exists only in cases of *insolvency* of the vendee. *The Constantia*, 6 Rob. Adm. 321.

(*l*) *Litt v. Cowley*, 7 Taunt. 169; *Holst v. Pownall*, 1 Esp. 240; *Newhall v. Vargas*, 13 Maine, 93. Notice should be given, it seems, to the carrier, middleman, or other person having at the time the actual custody of the goods; or given to such a person, that it may reach the carrier before delivery. *Mottram v. Heyer*, 5 Denio, 629. But in *Bell v. Moss*, 5 Whart. 189, it was given to the assignees of the consignee, who had become insolvent, and was held sufficient. In *Northey v. Field*, 2 Esp. 613, the demand was on the officer of the custom-house, where the goods were stored. *Whitehead v. Anderson*, 9 M. & W. 518, is an important case upon this point. There it is held that a notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time, and under such circumstances, as that he may by the exercise of reasonable

mand on behalf of the consignor need not be made by any person specially authorized for that purpose; it may be made by a general agent of the consignor; or even by a stranger, if it be ratified by the vendor before the delivery to the vendee. (m) But a ratification of a notice and demand by an unauthorized person, not made until after delivery to the vendee, will not suffice. (n)

The question has been raised when the insolvency may take place, in order to give this right; that is, whether the right exists by reason of an insolvency before the sale; and it was held that the insolvency must take place between the time of the sale and that of the exercise of the right of stoppage. (o)

diligence communicate it to his servant, in time to prevent the delivery to the consignee. Therefore, where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the shipowner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor — was held not to be a sufficient notice of stoppage *in transitu*.

(m) *Whitehead v. Anderson*, 9 M. & W. 518; *Bell v. Moss*, 5 Whart. 189; *Newhall v. Vargas*, 13 Maine, 93.

(n) *Bird v. Brown*, 4 Exch. R. 786.

(o) *Rogers v. Thomas*, 20 Conn. 53, a very able case on this point. As this question seems to have been first raised in this case, we give the language of *Storrs, J.*: — “The remaining inquiry respects the time when such insolvency must occur, in order to confer this right. On this point we are of opinion that it is not sufficient it exists when the sale takes place, but that it must intervene between the sale and the exercise of such right. It is well settled, that after the sale, and before the vendor has taken any steps to forward the property to the vendee, the former has a lien upon it, by virtue of which he may, on the occurrence of the insolvency of the latter, retain the goods in his possession, as a security for the price. This is a strictly analogous right to that of stopping them after they have been forwarded, and while they are on their way to the vendee, and depends on the

same principles. And it may be here remarked, that the cases decided on the subject of that right of lien confirm the views which we have expressed as to the meaning of insolvency as applied to the right of stoppage, after the *transitus* has commenced. The same equitable principle which authorizes a retention of the possession in the one case, and a recovery of it in the other, would seem to authorize the latter, where the insolvency occurred after the sale and before the forwarding of the property. The right of stopping it after the *transitus* has commenced may not, therefore, be limited, to the case where insolvency occurs after it has left the possession of the vendor, but may extend to cases where it occurred at any time after the sale. However that may be, we are clear that it must occur after the sale. In favor of this position there is the same argument, from an entire absence of authority against it, as was derived from that source on the point which we have just considered; and it applies with equal force. We find no decided case in which the right in question has been sanctioned, excepting where the insolvency occurred subsequent to the sale. And although the language of the courts may sometimes seem to import that the right exists, irrespective of the time when the insolvency took place, it is quite plain that, applying their expressions to the cases they were considering, and which did not involve this point, they were not intended to have that construction. But in most of the decided cases on this subject it will be

It has been much disputed, and may not yet be entirely settled, whether this is a right to rescind the sale, (*p*) or only an extension of the common-law lien of the seller. (*q*) The difference is important. If stoppage *in transitu* rescinds the sale, the vendor thereby takes possession of the goods as his own, and has no claim on the purchaser for the price. But if it be only the exercise of a right of lien, then the property in the goods remains in the purchaser or those who represent him, and the right to the price of the goods remains with the vendor. (*r*) Therefore, if the vendor now sells them, it must be as any one may sell goods on which he has a lien to secure an unpaid debt; if they bring more than the debt he must account for the surplus; if they bring less, he may demand the balance from the purchaser. (*s*)

* This question has been much agitated; but we think the strongly prevailing authority and reason are in favor of its being an exercise of a lien by the seller, and not a rescission of the sale. Doubtless there are difficulties attendant upon either view of this question. Thus, it may be said that a seller cannot retain a lien who has parted with his posses-

seen that their language is most unequivocal, and in terms limits the right of stoppage to cases of bankruptcy or insolvency, occurring while the goods are *in transitu*, and of course after the sale."

(*p*) This question was much discussed in *Clay v. Harrison*, 10 B. & C. 99, but, according to a *dictum* of *Parke, J.*, in *Stephens v. Wilkinson*, 2 B. & Ad. 323, not decided. See *Wilmhurst v. Bowker*, 5 Bing. N. C. 547; *Edwards v. Brewer*, 2 M. & W. 375. The old case of *Langfort v. Tyler*, 1 Salk. 113, permitting the vendor to resell the goods, seems to proceed upon the ground of a rescission of the contract. The history and character of this right was much discussed in Lord Abinger's judgment in *Gibson v. Carruthers*, 8 M. & W. 336. And see *Wentworth v. Outhwaite*, 10 M. & W. 451.

(*q*) The weight of authority, as well as the reason of the thing, is decidedly in favor of considering the right as an extension of the common-law lien for the price, or, as Lord *Kenyon* observed in *Hodgson v. Loy*, 7 T. R. 445, "an equitable lien adopted by the law, for

the purposes of substantial justice." And it seems that the right was first introduced into equity before it was applied by the common-law courts. See *Wiseman v. Vandeput*, 2 Vern. 203; *Snee v. Prescott*, 1 Atk. 246; *D'Aquila v. Lambert*, 2 Eden, 75, Ambl. 399. In the following cases this right has been considered not a rescission of the sale, but merely an extension of the lien. *Wentworth v. Outhwaite*, 10 M. & W. 436; *Bloxam v. Sanders*, 4 B. & C. 941; *Jordan v. James*, 5 Ham. 88; *Rowley v. Bigelow*, 12 Pick. 307; *Newhall v. Vargas*, 13 Maine, 93, 15 Maine, 315; *Rogers v. Thomas*, 20 Conn. 53; *Gwynne, Ex parte*, 12 Ves. 379; *Martindale v. Smith*, 1 Q. B. 389; *Chandler v. Fulton*, 10 Tex. 2.

(*r*) There would seem to be no doubt that the vendor may sue for the price of the goods, notwithstanding he has stopped them *in transitu*, provided he is ready to deliver them on demand and payment. *Kymer v. Suwercroft*, 1 Camp. 109.

(*s*) This was distinctly adjudged in *Newhall v. Vargas*, 15 Maine, 314, a very able case on this subject.

sion. And then the right would be considered rather as a *quasi* lien; or, in other words, the right of stoppage *in transitu* is measured and governed as to its effect and consequences, rather by the rules of law applicable to lien than by those which would belong to a rescission of the sale. Perhaps the difference of opinion on this subject may be attributed in some degree at least to the difference in the circumstances of the cases in which the question has arisen. Thus, if there has been a complete sale of a specific chattel, agreeably to a specific order of the purchaser, the *property* in the chattel would, it should seem, pass thereby to the purchaser, subject only to the exercise of the seller's lien for the price. And, in such a case, the exercise of the right of stoppage would revert in the seller only the *possession*, just as it was when he sent the goods away; that is, subject to the *property* in the purchaser, and only for the purpose of restoring and making effectual the seller's lien. But, on the other hand, if A. should send to B. an order for a certain quantity of goods of a certain kind or description, and B. should procure goods which he supposed answerable to the order, and send them to A., and should then hear of the failure of A., and thereupon stop the goods on their passage, B.'s rights might become the same as if he had never sent the goods; and the *property* would remain in him, because they had never been accepted by A., and now never could be. (t) Still, however, we think there is a strong tendency in the courts both of England and this country, to treat the right of stoppage *in transitu* as the exercise of a lien.

In some respects it is treated as an absolute lien, and on this ground denied to exist at all, where it cannot exist as a * lien. Thus it is said that this right belongs only to one who sold the goods, or had distinctly the property in them; and not to one who has himself only a lien on them, as a bailee who has a lien for work done, or the like; for when such a party sends the goods away from him he parts with the possession, and his own lien ceases. (u)

(t) See *Clay v. Harrison*, 10 B. & C. 99, and note to that case; *James v. Griffin*, 2 M. & W. 623, 632, *Parke*, B.

(u) *Sweet v. Pym*, 1 East, 4.

It is indeed quite well settled, that the right of stoppage *in transitu* exists only between vendor and vendee, or between persons standing *substantially* in that relation. A mere surety for the price, upon whom there is no primary liability to pay for the goods, cannot stop them upon the insolvency of the vendee merely to secure himself from loss. (v) But if the consignor is *virtually* the vendor, he may exercise the right. Thus, if a person in this country should send an order to his correspondent in Paris to procure and ship to him certain goods, which the latter should procure *on his own credit*, without naming the principal, and ship to him at the original price, adding only his commission, he would be considered as an original vendor, so far at least as to give him the right of stoppage *in transitu*, (w) if not for all purposes. So a principal who consigns goods to his factor upon credit may stop them on the factor's insolvency. (x) The right of stoppage *in transitu* is not confined to a sale of goods. A person remitting money on a particular account, or for a particular purpose may stop the same on hearing of the insolvency of the consignee. (y) The fact that the accounts between the consignor and consignee are unadjusted, rendering it uncertain whether there is, or will be, a balance due the consignor, will not prevent the consignor from exercising this right. (z) But goods shipped to pay a precedent and existing debt cannot be stopped on the insolvency of the consignee. (a) A consignor may, however, * exercise this right, although he has received a bill of exchange for the goods and indorsed it over; (b) or even if he has received actual payment for a part of the goods. (c)

(v) *Siffkin v. Wray*, 6 East, 371.

(w) *Feise v. Wray*, 3 East, 93.

(x) *Kinloch v. Craig*, 3 T. R. 119.

(y) *Smith v. Bowles*, 2 Esp. 578.

Aliter upon a general remittance from a debtor to his creditor on account of his debt.

(z) *Wood v. Jones*, 7 D. & R. 126; *Vertue v. Jewell*, 4 Camp. 31.

(a) *Wood v. Roach*, 1 Yeates, 177, 2 Dallas, 180; *Summeril v. Elder*, 1 Binn. 106; *Clark v. Mauran*, 3 Paige, 373.

(b) And this is true although the bills are not yet mature. *Newhall v.*

Vargas, 13 Maine, 93; *Bell v. Moss*, 5 Whart. 189; *Feise v. Wray*, 3 East, 93; *Jenkyns v. Usborne*, 7 M. & G. 678, 698; *Donath v. Broomhead*, 7 Barr, 301. And it is said that the consignor need not tender back the bill. *Edwards v. Brewer*, 2 M. & W. 375; *Hays v. Mouille*, 14 Penn. St. R. 48. But of this we should have some doubts.

(c) *Hodgson v. Loy*, 7 T. R. 440; *Newhall v. Vargas*, 13 Maine, 93.—*Quære*, whether in those States where a negotiable bill or note is considered *prima facie* as payment, such a bill or

It is often important, and sometimes difficult to determine whether the goods which it is sought to stop are still *in transitu*. (d) The general rule is, that they are so not only while in motion, and not only while in the actual possession of the carrier, (although he was appointed and specified by the consignee,) but also while they are deposited in any place distinctly connected with the transmission or delivery of them, (e) or rather, while in any place

note, given for the whole price, would defeat the right of stoppage? See *Chapman v. Searle*, 3 Pick. 38; *Hutchins v. Olcott*, 4 Verm. 549; *White v. Dougherty*, Mart. & Yerg. 309. See *Horncastle v. Farran*, 3 B. & Ald. 497; *Bunney v. Poyntz*, 4 B. & Ad. 568.

(d) If part of the goods have been delivered, the rest may nevertheless be stopped. *Buckley v. Furniss*, 17 Wend. 504. So held where the goods were separated, and one wagon-load had been delivered before the rest arrived. See also *Hanson v. Meyer*, 6 East, 614. In *Tanner v. Scovell*, 14 M. & W. 28, goods were shipped for London, and were landed at a wharf and entered on the wharfinger's books in the *consignor's* name; he had also given the vendee an order for their delivery, under which he had received and sold the greater part; *held*, notwithstanding, the *transitus* of the rest might be arrested. On the other hand, in *Hammond v. Anderson*, 4 B. & P. 69, the vendor and vendee both lived in the same town; and the goods lay at the wharf of a third person. The vendee having received an order for the delivery of the property, went to the wharf, weighed the whole, and took away a part; it was *held* that the vendor had then no right to stop the remainder. So in *Slubey v. Heyward*, 2 H. Bl. 504, the whole property arrived at the port of delivery; the consignees entered the whole cargo at the custom house; they also removed a part before the consignor attempted to stop the goods. It was *held* too late. See also *Jones v. Jones*, 8 M. & W. 431; *Bunney v. Poyntz*, 4 B. & Ad. 571, where part delivery of a portion of a hay stack, with intent to separate that from the remainder, was *held* not sufficient. A valid stoppage of part of the goods forwarded under an entire contract will not abrogate the effect of an actual or constructive possession acquired by the consignor of the

residue. *Wentworth v. Outhwaite*, 10 M. & W. 436, a very important case. The dictum of *Taunton, J.*, in *Betts v. Gibbins*, 2 Ad. & El. 57, that a partial delivery is *prima facie* a delivery of the whole, has been denied. See *Tanner v. Scovell*, 14 M. & W. 37. This seems to have been mainly on the ground that it was not *intended* by the vendee, by taking possession of part, to take possession of the whole, but to separate that part, and take possession of it alone. In *Crawshay v. Eades*, 1 B. & C. 181, A. delivered a quantity of iron to be conveyed to B. the vendee. The carrier landed a part of the iron on B's wharf, when learning that B. had stopped payment, he reloaded the same on his barge, and carried the whole to his own premises. *Held* that the vendor might stop all the goods, the carrier having a lien on the whole for his freight, and as he had shown no assent to their delivery without payment of his lien, no part of the goods ever came into the possession of the vendee. See on this subject also, *Miles v. Gorton*, 2 Cr. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 313.

(e) This point was much discussed in *Sawyer v. Joslin*, 20 Verm. 172. There the goods were shipped at Troy, N. Y., directed to the purchaser at Vergennes, Vt. They were landed upon the wharf at Vergennes, half a mile from the purchaser's place of business. The purchaser's goods were usually landed at the same place, and it was not customary for the wharfinger, or the carrier, or any one for them, to have any care of the goods after they were landed; but the consignee was accustomed to transport the goods from the wharf to his place of business, as was also the custom with other persons having goods landed there. The goods while on the wharf were not subject to any lien for freight or charges; it was

not actually or constructively the place of the consignee, or so in his possession or under his control, that the putting them there implies the intention of delivery. Thus, if goods are lodged in a public warehouse for non-payment of duties, they are not in the possession of the vendee, and the vendor may stop them. (*f*) So where goods are still in the custom-house, the right to stop them is not defeated, although the vendee has paid the freight, the goods having been *not* entered through loss of the invoice. (*g*) The entry of the goods without payment of duties is not a termination of the transit. (*h*)

* They are in transit until they pass into the possession of the vendee. But this possession may be actual or constructive.

held that a delivery on the wharf was a constructive delivery to the vendee, and that the right of stoppage was gone when the goods were landed. The cases on this point were thus classified by *Hall, J.*, who delivered the opinion of the court:—"The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes:—1. Cases in which it has been held that the right of stoppage existed, where the goods were originally forwarded on board of a ship chartered by the vendee. 2. Where the delivery of the goods to the vendee has been deemed incomplete, by reason of his refusal to accept them. 3. Where goods remained in the custom-house, subject to a government bill for duties. 4. Where they were still in the hands of the carrier, or wharfinger, as his agent, subject to the carrier's lien for freights. 5. Where the goods, though arrived at their port of delivery, were still on shipboard, or in the hands of the ship's lighterman, to be conveyed to the wharf. 6. Where the goods had performed part of their transit, but were in the hands of a middle man, to be forwarded on by other carriers." *Tucker v. Humphrey*, 1 M. & P. 378, is an important case. There goods were shipped on board a vessel addressed to the defendant's wharf for one Gilbert. An invoice was sent to Gilbert, stating that the goods were bought and shipped for him, and on his account and risk; and

in the ship's manifest they were marked to be delivered "to order." Before the arrival of the vessel the purchaser became bankrupt, and after the vessel reached the wharf, but before the goods were landed, they were claimed by a person on behalf of the consignor, and they were delivered to him. In an action by the assignees of the consignee to recover the goods, *held*, the consignor had a right to stop them. See other instances in *Richardson v. Goss*, 3 B. & P. 127; *Loeschman v. Williams*, 4 Camp. 181; *Mills v. Ball*, 2 B. & P. 457; *Rowe v. Pickford*, 1 Moore, 526; *Leeds v. Wright*, 3 B. & P. 320.

(*f*) *Northey v. Field*, 2 Esp. 613; *Nix v. Olive*, cited in *Abbot on Shipping*, 490; *Mottram v. Heyer*, 5 Denio, 629, opinion of the Chancellor.

(*g*) *Donath v. Brownhead*, 7 Barr, 301.

(*h*) *Mottram v. Heyer*, 5 Denio, 629, 1 Denio, 483, an important case. The defendants were merchants in New York. They ordered the plaintiffs to send them from England a case of hardware. It arrived April 7, when the bill of lading was delivered to the plaintiffs, and the freight paid. On the 9th the goods were entered at the custom-house, and carried from the ship to the public store. While there, and before the duties were paid, the defendants became insolvent, and the plaintiffs demanded of them the goods. They refused to deliver them, and afterwards paid the duties, and removed them to their store. It was *held* that the demand was not sufficient to revest the title in the plaintiffs.

The doctrine that the goods must come to the "corporal touch" of the vendee, as was once said by Lord Kenyon, has long since been exploded. (i) Thus, suffering the goods to be marked and resold, and marked again by the second purchaser, has been considered a constructive delivery. (j) So, a delivery by the vendor, to the vendee, of the key of the vendor's warehouse, where the goods are stored, amounts to a delivery. (k) So, demanding and marking the goods by the vendee's agent at the inn where the goods arrived at their destination. (l)

If the carrier, by reason of an arrangement with the consignee, or for any cause, remains in possession, but holds the goods only as the agent of the consignee, and subject to his order, this is the possession of the consignee. (m) Yet, even *in cases where an existing usage authorizes a carrier to retain the goods in his hands as security for his whole claim against a consignee, the consignor may still stop them as *in transitu*, and take them from the carrier, by paying to him

(i) Wright v. Lawes, 4 Esp. 82; Mottram v. Heyer, 1 Denio, 483.

(j) Stoveld v. Hughes, 14 East, 308.

(k) So thought Lord Kenyon himself in Ellis v. Hunt, 3 T. R. 468.

(l) Ellis v. Hunt, 3 T. R. 464. So if the vendor agree to let the goods lie in his warehouse, for a short time, although *free of rent*, and to accommodate the vendee. Barrett v. Goddard, 3 Mason, 107. But see Townley v. Crump, 4 Ad. & El. 58, *contra*. So if rent be paid. Hurry v. Mangles, 1 Camp. 452. So delivering to the vendee a bill of parcels, with an order on the store-keeper for the delivery of the goods. Hollingsworth v. Napier, 3 Caines, 182. But *quære*, see *post*. So, giving an order by the vendor to the keeper of a warehouse, for the delivery of the goods. Harman v. Anderson, 2 Camp. 243. See also Frazer v. Hilliard, 2 Strob. 309. Delivery to a mercantile house, merely for transmission to the vendee, by a forwarding house, does not take away the right of stoppage. Hays v. Mouille, 14 Penn. St. R. 48.

(m) This principle is well illustrated by the case of Allan v. Gripper, 2 Cr. & Jer. 218, 2 Tyrwh. 217. The goods were conveyed by a carrier by water, and deposited in the carrier's ware-

house, to be delivered thence to the purchaser or his customers, as they should be wanted, in pursuance of an agreement to this effect between the carrier and the purchaser. This was the usual course of business between them. It was *held* that the carrier became the warehouseman of the purchaser, upon the goods being deposited there, and that the vendor's right of stoppage was gone. And the case was likened to Foster v. Frampton, 6 B. & C. 107, 9 D. & R. 108, where the vendee desired the carrier for his own convenience to let the goods remain in his warehouse until he received further directions; and also took home samples of the goods; but before the bulk was removed he became insolvent; *held* that the right of stoppage *in transitu* was gone. Scott v. Pettit, 3 B. & P. 469, was decided on the same principle. Goods were sent from Manchester *directed* to the purchasers at London; but in pursuance of a general order from the buyer to the seller were sent to the warehouse of the buyer's packer, and by the warehouseman were booked to the buyer's account, and the warehouseman unpacked them. The *transitus* was *held* at an end when the goods reached the warehouse.

the amount due specifically for the carriage of those goods. (n) And the master of a ship chartered wholly, or even owned by the consignee, may nevertheless be a carrier in whose hands the consignor may stop the goods, if the goods are to be delivered finally to the charterer himself. (o)

(n) *Oppenheim v. Russell*, 3 B. & P. 42, a very excellent case upon this subject.

(o) *Stubbs v. Lund*, 7 Mass. 453, recognizes this principle. There the vendors resided in Liverpool, England; the vendees in America. The goods were delivered on board the vendees' own ship, at Liverpool, and consigned to them or assigns, for which the master had signed bills of lading. The vendors, hearing of the insolvency of the vendees before the vessel left Liverpool, refused to let the vessel sail, claiming a right to stop the goods, and that they had not reached their destination. The right of stoppage was allowed, mainly, it seems, on the ground that the goods were, by the bills of lading, to be transported to the vendees, and were in transit until they reached them; but it was thought that if the goods had been intended for some foreign market, and never designed to reach any possession of the purchasers, more than they then had at the time of their shipment, the case would be different, and the transit in such a case would be considered as ended. *Parsons, C. J.*, thus laid down the law on this point:—"In our opinion the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment, (3 East, 381,) but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the ship-

ment." The court in this case rely upon *Bohtlingk v. Inglis*, 3 East, 381, where a person in England chartered a ship to go to Russia, and bring home goods from his correspondent there, the goods to make a complete cargo. The vessel proceeded to Russia, and the correspondent shipped the goods ordered at the risk of the freighter, and sent him the invoice and bills of lading. The goods were to be conveyed to the freighter in England. It was held that the delivery on board the vessel was not a final delivery, and that the goods might be stopped on the way; and on the same ground as before stated that they "were in their passage or transit from the consignor to the consignee." The distinction alluded to in the next note, was, however, fully recognized. See also *Coxe v. Harden*, 4 East, 211. *Newhall v. Vargas*, 13 Maine, 93, is also a clear illustration of the rule of the text. The purchaser lived in America; the consignor in Havana. The former sent his own vessel to Havana for a cargo of molasses, which was shipped on board the vessel, consigned to the vendee, and to be delivered to him at his port of residence; it was held that the vendor had the right to stop the goods at any time before they came into the actual possession of the vendee, and the case of *Stubbs v. Lund* was fully approved. See also *Thompson v. Trail*, 2 C. & P. 334; *Buckley v. Furniss*, 15 Wend. 137, 17 Wend. 504. The case of *Bolin v. Hufnagle*, 1 Rawle, 1, seems in direct conflict with these authorities, and we think cannot be supported. But see *Van Casteel v. Booker*, 2 Exch. 708, opinion of *Parke, B.* The recent case of *Turner v. The Trustees of Liverpool Docks*, in the Exchequer Chamber, 6 E. L. & E. 507, is an important case on this point. There *A. & Co.*, residing in Charleston, America, consigned cotton to *B. & Co.*, living at Liverpool, and delivered it on *B. & Co.*'s own vessel at Charleston, taking a bill of lading to deliver to their order or their assigns, they paying no freight, "*being owner's property.*" The consignors indorsed the

So, if by the bill of lading the goods are deliverable to the order of the consignor or his assigns, the property therein does not pass to the consignee, so as to defeat this right, although they may be delivered on board the consignee's own vessel, (*p*) and although the bill of lading expressed that the consignee was to pay no freight, the goods "being owner's property." (*q*) But it might be otherwise if it appeared by the bill of lading that the goods were put on board to be carried for and on account and risk of the consignee. (*r*) So if the goods are intended for a market foreign to the residence of the consignee, and never designed to come into the actual possession of the charterer, then it would seem that a delivery on board of the vessel, whether owned or hired by the purchaser or not, has been held final, and the right of stoppage *in transitu* gone. (*s*)

bill to the "Bank of Liverpool or order." The consignees became bankrupt before the cotton arrived at Liverpool. The consignors, on its arrival, claimed to stop the cargo *in transitu*. The assignees in bankruptcy claimed the cotton, as having been so completely delivered as to vest in the bankrupts as soon as it was put on board their own vessel at Charleston specially appointed by them to bring home such cargo. *Patteson, J.*, said:—"There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or assigns, and therefore there was not a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship. The vendors still reserved to themselves, at the time of the delivery to the captain, a *jus disponendi* of the goods, which he by signing the bill acknowledged." See also *Ellershaw v. Magniac*, 6 Exch. 570, note; *Van Casteel v. Booker*, 2 Exch. 691; *Wait v. Baker*, 2 Exch. 1; *Mitchel v. Ede*, 11 Ad. & El. 888; *Jenkyns v. Brown*, 14 Q. B. 496; *Key v. Cotesworth*, 14 E. L. & E. 435; *Aguirre v. Parmelee*, 22 Conn. 473.

(*p*) *Wait v. Baker*, 2 Exch. 1.

(*q*) *Turner v. Trustees of Liverpool Docks*, 6 E. L. & E. 507.

(*r*) *Van Casteel v. Booker*, 2 Exch. 691-708; *Wilmshurst v. Bowker*, 7 M. & G. 882; *Jenkyns v. Brown*, 19 Law J. Rep. (N. S.) Q. B. 286, 14 Q. B. 496.

(*s*) This distinction is fully supported by *Fowler v. Kymer*, cited in 3 East, 396, and recognized in *Stubbs v. Lund*, 7 Mass. 457; *Newhall v. Vargas*, 13 Maine, 93. *Rowley v. Bigelow*, 12 Pick. 308, supports the same view. The court there said:—"We think it very clear, that a delivery of the corn on board of a vessel appointed by the vendee to receive it, not for the purpose of transportation to him, or to a place appointed by him, to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business, to a third person, was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end." In *Valpy v. Gibson*, 4 C. B. 837, it was held that if goods are sold to be shipped to some ultimate destination, of which the vendor had knowledge, but were first to go into the hands of an agent of the purchaser, and there await the purchaser's orders, the right of stoppage *in transitu* was determined on delivery to such agent. See also the still later case of *Cowas-jee v. Thompson*, 5 Moore, P. C. 165. There goods contracted to be sold and delivered "free on board," to be paid for by cash

As the goods may pass *constructively* into the possession of the consignee, so they may be transferred by him before they reach him, in such a way as to destroy the consignor's right of stoppage *in transitu*. This may be done by an indorsement and delivery of the bill of lading. This instrument is now, (as we had occasion to say in an earlier part of this work,) (t) by the custom of merchants, which is adopted by the courts, and made a rule of law, regarded as negotiable; or, more accurately speaking, as *quasi* negotiable, its indorsement and delivery operating as a symbolic delivery of the goods mentioned in it. (u) And such transfer, *if it is in good faith and for a valuable consideration, passes the property to the second vendee, who holds it free from the right of the original vendor to stop the goods *in transitu*. (v) But a second vendee, to whom the bill of lading

or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay,) that trover would not lie for the goods, for that on their delivery on board the vessel they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser.

(t) See *ante*, p. *240.

(u) *Small v. Moates*, 9 Bing. 574; *Dixon v. Yates*, 5 B. & Ad. 313; *Jenkyns v. Osborne*, 7 M. & Gr. 678. The case of *Thompson v. Dominy*, 14 M. & W. 402, shows that the mere indorsement of a bill of lading does not authorize the indorsee to bring a suit in his own name against the signers, for their failure to deliver the goods according

to its terms; it would not be correct, therefore, to consider such bills *negotiable* exactly, although they have sometimes been so called, (see *Berkley v. Watling*, 7 Ad. & El. 29; *Bell v. Moss*, 5 Whart. 189, 205,) but rather that an indorsement of such bill would amount to a *symbolical delivery*. And if there were also a *bonâ fide* sale accompanying the transfer, the right of the vendor to stop *in transitu* is gone. *Newsom v. Thornton*, 6 East, 41, shows this. There Lord *Ellenborough*, C. J., said:—"A bill of lading indeed shall pass the property upon a *bonâ fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. But it cannot operate farther." *Lawrence*, J., added:—"In *Lickbarrow v. Mason*, some of the judges did indeed liken a bill of lading to a bill of exchange, and considered that the indorsement of the one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was drawn. But in the Exchequer Chamber there was much argument to show that, *in itself*, the indorsement of a bill of lading was no *transfer* of the property, though it might operate, as other instruments, as *evidence* of the transfer."

(v) The leading case on this subject is *Lickbarrow v. Mason*, first decided in the King's Bench, 1787, and reported

is not transferred, or not so transferred as to carry good title, and who neglects to take actual or constructive possession, is in no better position than the first vendee, under whom he claims; and the goods may be taken from him by the first vendor, on the insolvency of the first vendee. And if the bill of lading be so transferred and indorsed by way of pledge to secure the consignee's debt, the consignor does not lose entirely his right to stop the goods *in transitu*, but holds it *subject to the rights of the pledgee. That is, he may enforce his claim to hold the surplus of the value of the goods, after the pledgee's claim is satisfied; and he holds this surplus to secure the debt of the consignee to him. (w) But the pledgee's claim, which the consignor is thus bound to recognize, would not be for a general balance of account; but only for the specific advances made upon the security of that particular bill of lading. And therefore, by paying or tendering that amount, the consignor acquires the right of retaking

in 2 T. R. 63, and from thence carried to the Exchequer Chamber, where, in 1790, the decision below was reversed; reported in 1 H. Bl. 357. The record was thence removed into the House of Lords, where the judgment of the Exchequer Chamber was itself reversed, and a *venire de novo* awarded in June, 1793. Buller's able opinion before the House of Lords is reported in 6 East, 21, note. The cause was again tried before the King's Bench in 1794, at the head of which Lord Kenyon had in the mean time been placed, and decided in the same manner as in 1787, when the case was first before them. If a writ of error was again brought, it was probably abandoned, as no farther report of the case appears. A clear and succinct history of the law on this point is given in Abbott on Shipping, 471. The case of Lickbarrow v. Mason is to be understood as deciding only, that if there has been an actual and *bonâ fide* sale of goods by the consignee, the consignor cannot stop them, if the purchaser of the consignee has also taken an assignment to himself of the original bill of lading from the consignor to the consignee. The mere assignment of a bill of lading, not based on an actual sale of the goods, it is believed, would not destroy the vendor's right. The de-

livery of a bill of lading merely, the same being in the hands of the original consignee, *unindorsed*, will not, of course, interfere with the vendor's right of stoppage. Tucker v. Humphrey, 4 Bing. 516, 1 M. & P. 394, Park, J. And *a fortiori*, the delivery to the vendee of a mere shipping note of the goods, or a delivery order for them, instead of a bill of lading. Jenkyns v. Osborne, 7 M. & Gr. 678; Akerman v. Humphrey, 1 C. & P. 53; McEwan v. Smith, 13 Jurist, 265, 2 House of Lords Cas. 309; Townley v. Crump, 4 Ad. & El. 58. See, however, Hollingsworth v. Napier, 3 Caines, 182. In Walter v. Ross, 2 Wash. C. C. R. 283, is an excellent summary of the law on this point. It is there held that the indorsement and delivery of a bill of lading, or the delivery without indorsement, if by the terms of the bill the property is to be delivered to a particular person, amounts to a transfer of the *property*, but not to defeat the vendor's right of stoppage before the goods come actually into the possession of the vendee. But goods at sea may be sold, and if the bill of lading is indorsed, the right to stop *in transitu* is gone. See also Ryberg v. Snell, Id. 403.

(w) *In re Westzinthus*, 5 B. & Ad. 817; Chandler v. Fulton, 10 Tex. 2.

all the goods. (x) And if the pledgor had pledged some of his own goods together with those of the consignor, the latter would have a right to insist upon the appropriation of all the pledgor's own goods towards the claim of the pledgee, before any of the goods contained in the bill of lading. (y)

It is said that the exercise of this right is an act so far adverse to the vendee, that if the goods be stopped by virtue of an agreement between the buyer and seller, it is no longer a stoppage *in transitu*; but either a cancelling of the sale by mutual consent, or a reconveyance by the buyer. (a) And it then becomes in some cases a question of considerable difficulty, whether the buyer can dispossess himself of the goods, or of his right to them, for the benefit of the seller; or must hold them as a part of the funds to which his creditors generally may look. The principle which must decide such a question would seem to be this: if the sale is so far complete that the property in the goods has passed to the buyer, and the seller has become his creditor for the price, the buyer can have no more right to give to the seller security or satisfaction or other benefit from those goods than from any others which he may possess. But so long as the transaction is incomplete, the buyer may warn the seller of the danger of going on with it, and may aid him in the use of all legal

(x) *Spalding v. Ruding*, 6 Beavan, 376.

(y) *In re Westzinthus*, 5 B. & Ad. 817.

(a) This question was raised in *Ash v. Putnam*, 1 Hill, 302. So in *Naylor v. Dennie*, 8 Pick. 198, the same question was examined. It was there said that although the right of stoppage *in transitu* is adverse to the consignee, that means only that it cannot be exercised under a title derived from the consignee; not that it must be exercised *in hostility* to him. And this right of stoppage is not defeated, merely because the consignee gives the consignor a writing declaring that he revokes the order for the goods, and will not receive them, and requests the carrier to deliver them to the consignor. If the consignor, therefore, without regard to any such rescission of the sale by the consignee, duly exercise his right, no previous attachment by the creditors of the con-

signee, made during their transit, can be set up to defeat it. The consignor may rely upon his original property in the goods, and not upon any transfer or reconveyance by the vendee.—It is perfectly well settled that the mere sale of the goods by the vendee during their transit, unaccompanied with any indorsement or delivery of a bill of lading, &c., will not defeat the consignor's right of stoppage. *Craven v. Ryder*, 6 Taunt. 433; *Whitehouse v. Frost*, 12 East, 614; *Stoveld v. Hughes*, 14 East, 308; *Miles v. Gorton*, 2 Cr. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 339; *Stanton v. Eager*, 16 Pick. 467. *A fortiori*, an attachment, or seizure, on execution, by the creditors of the vendee will not. They can take no more rights than the vendee himself had. *Smith v. Goss*, 1 Camp. 282; *Buckley v. Furniss*, 15 Wend. 137; *Naylor v. Dennie*, 8 Pick. 198.

means to arrest the transaction where it stands, and so save to him his property. (*b*)

(*b*) In *Smith v. Field*, 5 T. R. 402, it was said that a contract of sale might be rescinded by the consent of vendor and vendee, before the rights of others were concerned. But where the vendee wished to return the goods, and the vendor instituted an attachment to attach them in the hands of the packer as the property of the vendee, it was considered as an election by the former not to rescind the contract; and the vendee afterwards having become bankrupt, the vendor was not allowed to recover the goods in trover against the packer. In *Salte v. Field*, *Id.* 211, goods were bought by vendee's agent, and lodged in the hands of the vendee's packer. While there, they were attached as the property of the vendee by some of his creditors. The vendee had in fact countermanded the purchase by letter to his agent, *written* before the delivery of the goods to the packer, though not received until afterwards. *Held*, the vendor assenting to take back the goods, that the property revested in

him, and the attachment was avoided. See *Atkin v. Barwick*, 1 Strange, 165; *Harman v. Fishar*, 1 Cowp. 125; *Alderson v. Temple*, 4 Burr. 2239. The consent of the vendor to retake the goods is, however, essential, where the sale has been completed by actual delivery. *Salte v. Field*, 5 T. R. 211. See *Richardson v. Goss*, 3 B. & P. 119; *Bartram v. Farebrother*, *Danson & Lloyd*, 42. Such consent may be inferred by the jury, if the vendor use and offer the property again for sale, although when he received it back he said he would keep it "without prejudice." *Long v. Preston*, 2 M. & P. 262. In *Quincy v. Tilton*, 5 Greenl. (Bennett's ed.) 277, it is said that where parties agree to rescind a sale, the same formalities of delivery, &c., are necessary to revest the property in the original vendor, which were necessary to pass it from him to the vendee. See also *Lanfear v. Sumner*, 17 Mass. 110; *Miller v. Smith*, 1 Mason, 437.

CHAPTER VII.

HIRING OF CHATTELS.

Goods are often hired in connection with real estate ; as where one hires a house with the furniture therein, or a room with its furniture. But although the clauses respecting such hire of chattels may form a part of a contract concerning real estate, they are construed and governed by the principles of the law of personalty. Much the greater number of questions which arise from the hiring or letting to hire of chattels are determined as questions of bailment ; and may be discussed to most advantage when we come to that subject.

It sometimes happens that parties seek to give to other contracts the appearance of a contract to hire ; or that they wish to make use of a contract to hire, for purposes usually accomplished by other means. Thus, suppose a person about to open a boarding-house, and needing furniture, and proposing to buy the same in whole or in part upon credit. The seller is willing to trust, if he can have the security of the property itself ; but if he does this by sale and mortgage back, it must be recorded, and an equity of redemption attaches. To avoid this, he makes a lease of the furniture to the other party, say for one year, and the lease contains a provision that the lessee may buy the same by paying a certain price therefor, at certain times. The lessee takes the property into his house, and a creditor without notice attaches it as his property. The question has sometimes arisen under these circumstances, whether this is not in law a sale with mortgage back ; and whether the attempt of the parties to avoid the notice of record, with the permission of the original owner to let the proposed purchaser take open possession without giving any notice of his rights, does not lay him open to lose the property if a *bonâ fide* creditor of the

hirer takes it by attachment. The question is one of mixed law and fact. We do not think that the law attaches to such a transaction an absolute presumption of fraud; and unless the circumstances are such that the jury can infer fraud from them, actual or constructive, the title of the original owner of the furniture would prevail. This question has arisen once or twice at *nisi prius*, but we do not know that it has been authoritatively decided by courts of law, sitting in bank.

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CHAPTER VIII.

GUARANTY OR SURETYSHIP.

Sect. I. — *What is a Guaranty.*

ORIGINALLY, the words warranty and guaranty were the same; the letter *g*, of the Norman French, being convertible with the *w* of the German and English, as in the names William or Guillaume. They are now sometimes used indiscriminately; but, in general, warranty is applied to a contract as to the title, quality, or quantity of a thing sold, which we have already considered under the head of sales; and guaranty is held to be the contract by which one person is bound to another, for the due fulfilment of a promise or engagement of a third party. And this we shall now consider.

In general, a guaranty is not negotiable, nor in any way transferable, so as to enable an action to be maintained upon it by any other person than him with whom the contract is made. (c) It is a promise to pay the debt of another; but

(c) *True v. Fuller*, 21 Pick. 140; *Tyler v. Binney*, 7 Mass. 479; *Lamoureux v. Hewit*, 5 Wend. 307; *Springer v. Hutchinson*, 19 Maine, 359; *McDoal v. Yeomans*, 8 Watts, 361; *Canfield v. Vaughan*, 8 Martin, 682; *Upham v. Prince*, 12 Mass. 14; *Miller v. Gaston*, 2 Hill, 188; *Watson v. McLaren*, 19 Wend. 557. Although the instrument may be in the form of a guaranty, yet if it contain in itself all the elements of a negotiable promissory note, it is then negotiable. See *Ketchell v. Burns*, 24 Wend. 456. In this case the instrument was as follows: — "For and in consideration of thirty-one dollars and fifty cents received of B. F. Spencer, I hereby guarantee the payment and collection of the within note

to him or bearer. Auburn, Sept. 25, 1837." (Signed) Thomas Burns. And it was held negotiable. In *Reed v. Garvin*, 12 S. & R. 100, it was held that a guaranty given by the assignor of a bond runs with it into whosoever hands it may come, and the guarantor cannot be a witness. See *McLaren v. Watson*, 26 Wend. 425; *Adams v. Jones*, 12 Pet. 207; *Walton v. Dodson*, 3 C. & P. 163; *Bradley v. Cary*, 8 Greenl. (Bennett's ed.) 234; *Phillips v. Bateman*, 16 East, 356. If a guaranty is directed to a particular house, by name, and another house advance goods upon it, they have no claim upon the guarantor. *Bleeker v. Hyde*, 3 McLean, 279; *Grant v. Naylor*, 4 Cranch. 224. And if the letter of guaranty is ad-

the guarantor may be held, although no suit could be maintained upon the original debt; and such guaranty may have been required for the very reason that the original debt could not be enforced at law; as where the guarantor promises to be responsible for goods to be supplied to a married woman, (*d*) or to be sold to an infant, not being necessities. (*e*) But where the original debt is not enforceable at law, the promise to be responsible for it is considered, for some purposes, as direct and not collateral; as, in fact, the original promise. (*f*) But if an infant purchase necessities, and give a promissory note signed by himself, and by another as surety, who pays the note, such surety can recover the amount, so paid, of the infant. (*g*) In general, the liability of the gua-

dressed to two persons and received and acted upon by one only, the guarantor is not bound. *Smith v. Montgomery*, 3 Texas, 199; *Myers v. Edge*, 7 T. R. 254. But where the guaranty is addressed to no person in particular it may be acted upon by any one, and if such appear to be the intention of the parties, goods may be furnished by several different dealers on the faith of the guaranty. *Lowry v. Adams*, 22 Verm. 160.

(*d*) See *Maggs v. Ames*, 4 Bing. 470; *Connerat v. Goldsmith*, 6 Georgia, 14.

(*e*) See *Conn v. Coburn*, 7 N. Hamp. 368.

(*f*) *Harris v. Huntbach*, 1 Burr. 373, and *Reid v. Nash*, there cited. See also *Buckmyr v. Darnall*, 2 Ld. Raym. 1085.

(*g*) *Conn v. Coburn*, 7 New Hamp. 368. In such case the cause of action arises when the surety pays the note. Upon the point whether such undertaking by the surety is original or collateral, *Parker, J.*, observed:—"It is very clear that this note cannot be regarded as an extinguishment of the debt of Coburn, so as to make him immediately liable to the plaintiff upon the giving of the note. The debt arose by the purchase and execution of the note. That was the contract, that he should have the goods on giving the note. The giving of a note, by an infant, for a debt due for necessities, does not cancel that debt, unless the note be paid, (3 New Hamp. 348); and the giving of

such a note, with a surety, certainly does not furnish evidence that the creditor intended to discharge the infant from all responsibility on account of the demand due him by reason of the articles furnished. If the infant is not liable on the note, as he would not be if he elected to avoid such liability, an assumpsit upon the delivery of the goods must be considered as subsisting against him, and the note of the surety be regarded as a collateral security for the payment. In this case nothing was paid at the time by the plaintiff. He only became surety for the payment. That was the contract as agreed to by all the parties. Had the plaintiff given his sole note, the case might have been different. He would then have assumed the whole liability, by the terms of the agreement, and the goods have been delivered entirely upon his credit. The defendant would have had no farther concern with it, and no right to interfere. But that was not the case here. The defendant had the right to pay and take up the note given by himself and the plaintiff, and he had this right only because he was in fact a debtor. He most unquestionably had a right to pay a note upon which he was a promisor. Suppose he had paid, whose debt would he have discharged? If the plaintiff's debt, then he must have had a claim against the plaintiff. But no such claim could have arisen upon such payment. If he had paid, then he would have discharged his own debt. But how could this be, if his debt had been

rantor is measured by that of the principal, and will be so construed, unless a less or a larger liability is expressly assumed by the guarantor; as if he guaranteed payment of a note by an indorser, whether the indorser were notified or not.

No especial words, or form, are necessary to constitute a guaranty. If the parties clearly manifest that intention, it is sufficient; and if the guaranty admits of more than one interpretation, and the guarantee has acted to his own detriment with the assent of the other party, as by advancing money, on the faith of one interpretation, that will prevail, although it be one which is most for the interest of the guarantee. (*g*) Still the contract is construed, if not strictly, accurately, (*h*) and a guaranty of the notes or debts of one, not only does not extend to his notes given jointly with another, (*i*) but if that one varies his business so as to change his liability from that which it was intended to guaranty, it would seem that the guarantor is discharged. (*j*) And the guarantor who pays the debt of his principal is entitled to all the securities of the creditor; (*k*) and equity will restrain a guarantee from enforcing his guaranty, until he has done what is necessary to turn these securities to account, where he alone can do this. (*l*) So if the creditor agree with the principal that the debt shall be reduced or abated in a certain proportion, the guarantor consenting, he cannot hold the whole of the original guaranty, but must permit that to be

paid by the giving of the note itself? Had the defendant paid the note, no right of action would ever have accrued to the plaintiff against him. Under such circumstances there is no ground for the position that the giving of the note was of itself a payment of the defendant's debt, so that a cause of action arose immediately to the plaintiff upon its execution; and the jury were correctly instructed that the cause of action arose when the defendant paid the money. *Clark v. Foxcraft*, 7 Green. 348."

(*g*) *Bell v. Bruen*, 1 How. 186; *Lawrence v. McCalmont*, 2 How. 449.

(*h*) *Bigelow v. Benton*, 14 Barb. 123; *Ryan v. Trustees*, 14 Ill. 20.

(*i*) *Russell v. Perkins*, 1 Mason, 368.

(*j*) *Id.*; *Wright v. Russell*, 3 Wils. 530, 2 Bl. 934; *Dry v. Davy*, 10 Ad. & El. 30.

(*k*) *Craythorne v. Swinburne*, 14 Ves. 162; *Parsons v. Bridgcock*, 2 Vern. 608; *Wright v. Morley*, 11 Ves. 12; *Copis v. Middleton*, T. & R. 224; *Hodgson v. Shaw*, 3 My. & K. 183; *Yonge v. Reynell*, 15 E. L. & E. 237; *McDaniels v. Flower Brook Manf. Co.* 22 Verm. 286; *Grove v. Brien*, 1 Maryl. 438; *Mathews v. Aikin*, 1 Comst. 595.

(*l*) *Cottin v. Blane*, 2 Anst. 544; *Wright v. Nutt*, 3 Bro. C. C. 326, 1 H. Bl. 137; *Wright v. Simpson*, 6 Ves. 728.

abated or reduced in the same proportion. (*m*) But after the guarantor has paid the debt, he has no right to demand an assignment to himself of the debt, or of the instrument which creates or expresses the debt, if a promissory note, bond, or the like, for the very reason that the debt, and with it the instrument, has been discharged, and so made of no effect. (*n*)

*SECTION II.

OF THE CONSIDERATION.

Although the promise to pay the debt of another be in writing, it is nevertheless of no force unless founded upon a consideration. (*o*) It is itself a distinct contract, and must rest upon its own consideration; but this consideration may be the same with that on which the original debt is founded, for which the guarantor is liable. The rule of law is this: If the original debt or obligation is already incurred or undertaken previous to the collateral undertaking, then there must be a new and distinct consideration to sustain the guaranty. (*p*) But if the original debt or obligation be founded

(*m*) *Bardwell v. Lydell*, 7 Bing. 489.

(*n*) *Copis v. Middleton*, T. & R. 224; *Hodgson v. Shaw*, 3 My. & K. 183; *Pray v. Maine*, 7 Cush. 253. But see *Low v. Blodgett*, 1 Foster, 121; *Good-year v. Watson*, 14 Barb. 486; *Edgerly v. Emerson*, 3 Foster, 557.

(*o*) *Wain v. Warlters*, 5 East, 10; *Elliot v. Giese*, 7 Har. & J. 457; *Leonard v. Vredenburg*, 8 Johns. 29; *Bailey v. Freeman*, 4 Johns. 280; *Clark v. Small*, 6 Yerg. 418; *Aldridge v. Turner*, 1 G. & Johns. 427; *Neelson v. Sanborne*, 2 New Hamp. 414; *Tenney v. Prince*, 4 Pick. 385; *Cobb v. Page*, 17 Penn. 469. For the law will not, as a general rule, imply a consideration from the fact that the agreement was in writing. *Dodge v. Burdell*, 13 Conn. 170; *Cutler v. Everett*, 33 Maine, 201. Forbearance, however, is a good consideration for the guaranty. *Sage v. Wilcox*, 6 Conn. 81; *Russell v. Babcock*, 14 Maine, 138. And if the guaranty is given contemporaneously with

the original debt, no other consideration is necessary. *Bailey v. Freeman*, 11 Johns. 221; *Hunt v. Adams*, 5 Mass. 358; *Wheelwright v. Moore*, 2 Hall, 143; *Rabaud v. De Wolf, Paine*, 580. So where the guaranty of a note is made at the same time with its transfer, the transfer is a sufficient consideration to support the guaranty. *How v. Kemball*, 2 McLean, 103; *Gillighan v. Boardman*, 29 Maine, 79. But a guaranty of payment of a preëxisting promissory note, where the only consideration is a past benefit or favor conferred, and without any design or expectation of remuneration, is without sufficient consideration, and cannot be enforced. *Ware v. Adams*, 24 Maine, 177.

(*p*) *Rabaud v. De Wolf, Paine*, 580; *Pike v. Irwin*, 1 Sandf. 14; *Elder v. Warfield*, 7 Har. & J. 391; *Ware v. Adams*, 24 Maine, 177; *Parker v. Barker*, 2 Met. 423; *Anderson v. Davis*, 9 Verm. 136; *Blake v. Farlin*, 22 Maine,

upon a good consideration, and at the time when it is incurred or undertaken, or before that time, the guaranty is given and received, and enters into the inducement for giving credit or supplying goods, then the consideration for which the original debt is incurred is regarded as a consideration also for the guaranty. (*q*) It is not necessary that any consideration pass directly from the party receiving the guaranty to the party giving it. If the party for whom the guaranty is given receive a benefit, or the party to whom it is given receive an injury, in consequence of the guaranty and as its inducement, this is a sufficient consideration. (*r*)

Wherever any fraud exists in the consideration of the contract of guaranty, or in the circumstances which induced it, the contract is entirely null. As where a guaranty was given for the price of a large amount of iron, and it was proved that the buyer, by arrangement with the seller, paid something more than the fair price, which addition was to go towards the payment of an old debt, the contract was not enforced as to so much of the price as would have been fair, but was set aside as altogether defeated by the fraud. (*rr*)

SECTION III.

WHETHER A PROMISE IS ORIGINAL OR COLLATERAL.

It often happens that a promise to pay the debt of another is not in writing, but is nevertheless enforced by the courts,

395; *Bell v. Welch*, 9 Com. Bench, 154.

(*q*) *Bainbridge v. Wade*, 1 E. L. & E. 236; *Campbell v. Knapp*, 15 Penn. 27; *Klein v. Currier*, 14 Ill. 237; *Bickford v. Gibbs*, 8 Cush. 156; *Leonard v. Vredenburg*, 8 Johns. 29; *Graham v. O'Neil*, 2 Hall, 474; *Conkey v. Hopkins*, 17 Johns. 113; *Gardiner v. Hopkins*, 5 Wend. 23; *Rabaud v. DeWolf*, Paine, 580. See *How v. Kemball*, 2 McLean, 103; *Kurtz v. Adams*, 7 Eng. (Ark.) 174.

(*r*) *Bickford v. Gibbs*, 8 Cush. 156; *Morley v. Boothby*, 3 Bing. 113, *Best*, C. J.; *Leonard v. Vredenburg*, 8 Johns. 29. In this case one A. applied to

B. for goods on credit, and B. refused to let him have them without security, on which A. drew a promissory note for the amount, under which C. wrote, "I guarantee the above," and the goods were then delivered. *Held*, that this was a collateral undertaking of C.; but that, as the transaction was one and entire, the consideration passing between A. and B. was sufficient to support as well the promise of C. as that of A., and no distinct consideration passing between B. and C. was necessary.

(*rr*) *Jackson v. Duehaire*, 3 T. R. 551; *Pidcock v. Bishop*, 3 B. & C.

on the ground that it is an original promise, and not a collateral one, and therefore not within the Statute of Frauds. (s)

605, 5 D. & R. 505. And *Bayley, J.*, in that case thus laid down the law: — "It is the duty of a party taking a guaranty to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril. . . . The plaintiff, when he accepted the guaranty, knew that Tickell was to pay him not only the market price of the iron, but ten shillings per ton on the iron provided, in extinction of an old debt. The concealment of that fact from the knowledge of the defendant was a fraud upon him, and avoids this contract. Where by a composition deed the creditors agree to take a certain sum in full discharge of their respective debts, a secret agreement, by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that that agreement is a fraud upon the rest of the creditors. So that a contract which is a fraud upon a third person may, on that account, be void as between the parties to it. Here the contract to guaranty is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety." See also *Stone v. Compton*, 5 Bing. N. C. 142. So it was held in *Evans v. Keeland*, 9 Ala. 42, that a surety may avoid his contract for a fraudulent concealment or misrepresentation of facts by the creditor, to induce him to become surety, although the contract for which he was bound as surety is binding on his principal. But it was held in the same case that a misrepresentation which will have this effect must be the false assertion of a fact, and not the expression of an opinion of the value or quality of the property sold. Thus a declaration by the vendor that the land he was selling was as good or better than other tracts to which he referred; that there was a comfortable dwelling-house, good out-houses, peach orchards, &c., on the land, is the expression of an opinion, and not the assertion of a fact, the incorrectness or falsehood of which would enable the surety to avoid his contract. So in *Martin v. Striblin*, 1 Speers, 23, it was held that it is no discharge of a surety that he expected, when he signed

as surety, that a third person would also sign as surety, and that such third person would receive from the principal certain books and papers, as an indemnity for the suretyship; unless it is shown that the surety stipulated that the paper should not have effect until one or both of such things were done, or that the signature of the surety was obtained by means of a fraudulent representation that such third person would sign the notes, and that the principal would place in such third person's hands his books and papers, to be by him collected and applied in payment of the debt. And in *Graves v. Tucker*, 10 S. & M. 9, it was decided that a fraud practised by a principal debtor upon his surety, in obtaining the signature of the surety, does not discharge him from his obligation to the obligee of the bond, unless such fraud was with the knowledge or consent of the obligee. — So, where the surety of a note given for property purchased at an administrator's sale, when requested by the principal to sign it, was told by the payee that his signature was only wanted as a form to comply with the order of the ordinary, it was held that no fraud was thereby practised on the surety which could avoid the note as to him. *Smyley v. Head*, 2 Rich. 590. See also *Railton v. Mathews*, 10 Clark & Fin. 936, and *Hamilton v. Watson*, 12 Clark & Fin. 109.

(s) Thus, in *Allen v. Thompson*, 10 New Hamp. 32, the plaintiff had obtained the account book of his debtor, as a pledge to secure the debt; and the defendant, in consideration that the plaintiff would deliver the book to one B., to collect the demands, verbally promised the plaintiff to pay him the amount due from the debtor, if B. should not collect enough for that purpose. *Parker, C. J.* "In cases of mere forbearance, there is no consideration independent of the debt, the forbearance being of the debt itself; and it may, perhaps, be said, that this consideration, being thus connected with the debt, moves only between the parties to the original contract, although the delay is at the request and on the promise of a third person. But in this case there is not only a new consideration,

The question, what are the circumstances which authorize this distinction, has been very much discussed, and very *variously decided. The Statute of Frauds being intended to prevent frauds, courts are generally reluctant to permit it to be so applied as to work a fraud. This cannot be always prevented. But the endeavor to prevent it, by construing the promise as original and not collateral, has sometimes led to *dicta*, and perhaps to decisions which are hardly to be reconciled with any reasonable interpretation or application of the statute. If we collate the cases which relate to this question, and especially those which seem to have been most carefully considered, we may draw from them this rule;—that where the promise to pay the debt of another is founded upon a new consideration, and this consideration passes between the parties to this promise, and gives to the promisor a benefit which he did not enjoy before, and would not have possessed but for the promise, then it will be regarded as an original promise, and therefore will be enforced, although not in writing. (t) Thus, if the property of the debtor be attached, and the attachment withdrawn at the request of the guarantor, this is a good consideration to support the guaranty, but not enough to make it an original promise. But if the property be not only relieved from attachment, but delivered

but one which is distinct from and independent of the debt; and the delivery of the books to Bryant, on the defendant's request, being in effect the same as a delivery to the defendant himself, this new consideration passes between the parties to the new contract. The authorities are clear that cases of this description are not within the statute, and no writing is necessary to make the contract valid." So in *Hilton v. Dinsmore*, 21 Maine, 410, it was determined that if a promise by the defendant, to pay the previously existing debt of a third person, be grounded upon the consideration of funds placed in his hands by the original debtor, with a view to the payment of this debt, as well as upon an agreement on the part of the plaintiff to forbear to sue, it is an original undertaking, and need not be evidenced by writing. But it is denied that a promise to pay the prior debt of another, on the consideration merely of

forbearance to enforce payment, is valid, unless the promise be in writing.

(t) In *Tileston v. Nettleton*, 6 Pick. 509, it appeared that the plaintiff, who was an innkeeper, on the 4th of July, 1825, furnished a dinner for a public celebration. He received his directions from a committee of arrangements, of which the defendant was a member. It was understood that every one who dined was to pay for his own dinner, and the committee were to incur no liability. Among those who dined was a military company, called the Hampden Guards, of which the defendant was commander. During the dinner the servants of the plaintiff came round to collect the pay. When about to call upon the Guards, the defendant told them they need not call upon them, for he would be responsible for them. The action was brought against the defendant to recover for the dinner furnished to the Guards. It was *held* that the de-

to the guarantor at his request, this may suffice to make it an original promise. (*u*)

* The entry in the books of the seller is often of great importance in determining whether a promise be original or collateral. Being made by the seller, it is of course of far greater weight when against him than when it sustains his claim. Suppose that A. promises to pay B., if B. will sell goods which C. is to receive. The question may occur whether they were sold to A. for C.'s benefit, or to C. on the guaranty of A. If, on examination of the books of B., it appears that at the time of the sale he charged the goods to C., as sold to him, it would be almost decisive against B.'s claim against A. as the original purchaser. But if it was found that he had charged the goods to A., it would still be open to A. to show that he had no right to do so. It often happens that a seller makes such a charge with a view of enlarging or asserting his rights, on the supposition that this charge will suffice to fix the liability on the person against whom it is made. But it is obvious that such an entry can have no effect, unless the circumstances of the sale show it to be in conformity with the true rights and obligations of the party. Nor would an entry by the seller to one party be absolutely conclusive against his right to claim payment of another as the original purchaser, if he were able to show clearly that the entry was made by mistake, to one who was not the buyer, and without any purpose of discharging him who was the buyer. (*v*) Whether a contract is collateral or

fendant's promise was not an original, but a collateral undertaking, and therefore within the statute of frauds. See, also, *Cahill v. Bigelow*, 18 Pick. 369.

(*u*) *Nelson v. Boynton*, 3 Met. 396, where this point is discussed at much length and with great force, by *Shaw, C. J.*; *Skelton v. Brewster*, 8 Johns. 376; *Stanly v. Hendricks*, 13 Ire. L. 86; *Randle v. Harris*, 6 Yerg. 508. In this last case a sheriff levied an execution upon the property of the defendant in the possession of a third person, and such third person agreed verbally if the sheriff would release the property he would pay the execution. *Held*, that this agreement was binding in law and not within the statute of frauds. In

Durham v. Arledge, 1 Strob. 5, one A. held an execution against B. C., the father of B., promised A. that if he would delay enforcing the execution, he would pay him \$100 in cash, and the balance in one year. The promise not being in writing, this mere suspension of the plaintiff's legal right was held not to constitute such a new and independent consideration as would give effect to the promise to pay the debt of another, as an original contract. See also *Tindal v. Touchberry*, 3 Strob. L. 177; *Blount v. Hawkins*, 19 Ala. 100.

(*v*) In *Matthews v. Milton*, 4 Yerg. 576, it appeared that A. and B. being in the plaintiffs' store together, A. told the plaintiffs he would pay for any arti-

original, may be a question of *construction*, and then it is for the court; but it is often regarded as a question of fact, and then it is for the jury. (*vv*)

Sales by a factor, with a guaranty of the price from the factor to the owner, are common in all commercial countries. In Europe they are commonly called "*del credere*" *contracts; and the commission charged by the factor, and intended to cover not only his services in selling, but his risk in insuring the payments, is called a "*del credere* commission," as we have remarked before; but this phrase is seldom used here, although this kind of contract is very common. It is, in one sense, a promise to pay the debt of another; and it has been said by English courts that it must be in writing. (*w*) We doubt, however, whether this doctrine would be held in England now; (*ww*) and so far as the question has been adjudicated in this country, it has been held, as we have already stated, to be an original promise, and therefore enforceable at law, although not in writing. (*x*) The promisor in fact receives a direct consideration for this precise promise, from the promisee.

SECTION IV.

OF THE AGREEMENT AND ACCEPTANCE.

The contract of guaranty, like every other contract, implies two parties, and requires the agreement of both parties to

cle B. might take up, and B. thereupon purchased several articles, which the plaintiffs charged to A. and B. *Held*, that the promise of A. was within the statute of frauds, as being a promise to pay the debt of B. *Aliter*, if the articles had been charged to A. alone, for then it would not have been B.'s debt. See, also, *Gardiner v. Hopkins*, 5 Wend. 23; *Graham v. O'Neil*, 2 Hall, 474; *Porter v. Langhorn*, 2 Bibb, 63; *Flanders v. Crolius*, 1 Duer, 206. But where A. requested B. to sell goods to C., promising by parol to indorse C.'s note for the price, it was *held* that this promise was within the statute of frauds, and therefore void. *Carville v. Crane*, 5 Hill, 483. See also *Conolly v. Ket-*

tlewell, 1 Gill, 260; *Hopkins v. Richardson*, 9 Grattan, 485; *Cutler v. Hinton*, 6 Rand. 509; *Leland v. Creyon*, 1 McCord, 100.

(*vv*) See *Sinclair v. Richardson*, 12 Verm. 33; *Flanders v. Crolius*, 1 Duer, 206.

(*w*) *Chitty on Contracts*, 196; *Gall v. Comber*, 1 Moore, 279.

(*ww*) Since the first edition of this volume was published, the Court of Exchequer have decided in *Conturier v. Hastie*, 16 E. L. & E. 562, that such agreement by a factor is not within the statute of frauds, as being a promise to answer for the default of another.

(*x*) See *ante*, p. 78, n. (t), *et seq.*

make it valid. In other words, a promise to pay the debt of another is not valid, unless it is accepted by the promisee. (y) Language is sometimes used by courts and legists which might seem to mean that there were cases of guaranty which need not be accepted; but this is not accurate; there are cases in which this acceptance is implied and presumed; but there must be acceptance or assent, express or implied, or there can be no contract. The true questions are, when must this acceptance be express and positive, and in what way and at what time must it be made, when an express acceptance is necessary. And these questions have sometimes been found to be very difficult. If one goes *with a purchaser, and there says to the seller, "furnish him with the goods he wishes, and I will guaranty the payment," and the seller thereupon furnishes the goods, this would be a sufficient acceptance of the guaranty, and a sufficient notice to the guarantor. All the parts of the transaction would be connected, and could leave no doubt as to its character. But if the guaranty were for a future operation, perhaps for one of uncertain amount, and offered by letter, there should then, according to the weight of authority, be a distinct notice of acceptance, and also a notice of the amount advanced upon the guaranty, unless that amount be the same that is specified in the guaranty itself. (z) The reason of this is, that the

(y) *Mozley v. Tinkler*, 1 C. M. & R. 692; *McIver v. Richardson*, 1 M. & S. 557. A mere overture or offer to guaranty is not binding unless accepted. *Chitty on Cont.* 437, n. (1); *Caton v. Shaw*, 2 Harr. & Gill, 13; *Menard v. Scudder*, 7 Louis. Ann. 385.

(z) We have already considered this subject somewhat in our chapter on assent. See p. 402, and notes. The modern cases have quite generally established the doctrine, that where the proposition to guarantee, or letter of credit, is future in its application, and uncertain in its amount, the guarantor must have notice that his guaranty is accepted, and that goods are delivered upon it. *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Norton v. Eastman*, 4 Greenl. (Bennett's ed.) 521; *Tuckerman v. French*, 7 Greenl. (Bennett's ed.) 115; *Kay v. Allen*, 9

Barr, 320; *Cremer v. Higginson*, 1 *Mason*, 323; *Howe v. Nickels*, 22 *Maine*, 175; *Hill v. Calvin*, 4 *How.* [Miss.] 231; *Taylor v. Wetmore*, 10 *Ohio*, 490; *Lawson v. Townes*, 2 *Ala.* 373; *Mussey v. Rayner*, 22 *Pick.* 223; *Wildes v. Savage*, 1 *Story*, 22. This notice must be given in a reasonable time after it is accepted. *Ib.* Notice of the acceptance is not necessary, however, where the acceptance is contemporaneous with the guaranty. *Wildes v. Savage*, 1 *Story*, 22; *Bleeker v. Hyde*, 3 *McLean*, 279. In *New Haven County Bank v. Mitchell*, 15 *Conn.* 206, where A. executed a writing, whereby he agreed with B. for value received, that he, A., would, at all times, hold himself responsible to B. to a limited amount, for such paper as might be indorsed by C. and holden by B. within the amount specified, without notice to be given to A. by B., and such

guarantor may know distinctly his liability, and have the means of arranging his relations as he would with the party in whose favor the guaranty is given, and take from him security or indemnity. From the reason of the thing we may state the rule to be, that every guarantor must have this opportunity; and unless the transaction is such that of itself it gives him all the knowledge he needs, at a proper time, then this knowledge must be given him by specific notice.

writing was simultaneously delivered by A. and accepted by B., and B. on the credit thereof discounted paper indorsed by C.; it was *held*, 1st, that no other acceptance by B. or notice thereof to A. was necessary to perfect the obligation of A.; 2d, that no notice to A. of the amount of credit given by B. on the paper indorsed by C. was necessary, this being expressly dispensed with by the terms of the contract.—Some authorities hold that not only must the guarantor have reasonable notice of the acceptance of his guaranty, but also of the amount of goods delivered upon it, and that payment for the same has been demanded of the original debtor. *Howe v. Nickels*, 22 Maine, 175. So in *Clark v. Remington*, 11 Met. 361, R. by his guaranty engaged to pay C. for goods which C. might, from time to time, sell and deliver to D. C. accepted the guaranty, and R. had notice that it was accepted. C. delivered one parcel of goods to D., for which D. seasonably paid. In September, 1842, C. delivered other goods to D., and in March, 1843, took D.'s note therefor, payable in twenty days, which was never paid. In June, 1843, D. was in business, and had property sufficient to pay C. In April, 1844, D. was discharged from his debts under the insolvent laws, but paid no dividend, and C. did not prove his claim against him under the proceedings in insolvency. C. gave R. no notice of the credit which he had given to D., nor of the state of D.'s accounts with him, nor of D.'s failure to meet his payments, until the 1st of January, 1845, when he demanded payment from R. of the amount due to him from D. *Held*, that R. was discharged from his liability on the guaranty by C.'s omission to give him seasonable notice of the amount due from D., and of D.'s

failure to pay it. See also *McGuire v. Newkirk*, 1 Eng. [Ark.] 142. In *Craft v. Isham*, 13 Conn. 28, the facts were that in April, 1832, A. gave B. a writing, guaranteeing the payment to B. of goods which he should sell to C., to the amount of \$1,000, if C. should fail to pay at the end of three years. C. was the son-in-law of A., and A. daily passed C.'s store, and occasionally purchased goods there. B. furnished C. goods, to the amount of about \$1,000, between the said April and November following, on a credit of four months, the last credit expiring on the 10th of March, 1833. In November, 1834, C. became insolvent, and never paid for the goods. No notice was at any time given to A. of the acceptance of the guaranty by B., nor was any notice given to him of the amount of the debt due from C. for the goods, until November, 1835. In an action by B. against A. on the guaranty, it was *held*, that the defendant was entitled to notice, within a reasonable time, of the acceptance of the guaranty by the plaintiff, and of the amount of the goods furnished under it, and that the notice given in this case was not within a reasonable time. In New York, however, in the case of *Douglass v. Howland*, 24 Wend. 35, the court say, "Unless there is something in the nature of the contract or terms of the writing, creating or implying the necessity of acceptance or notice as a condition of liability, neither are deemed requisite." And in *Union Bank v. Coster's Exrs.* 3 Comstock, 212, the court referring to *Douglass v. Howland* and *Smith v. Dann*, 6 Hill, 543, say, "We must hold the law to be settled in this State, that where the guaranty is absolute no notice of acceptance is necessary."

As to the manner of the notice, no cases have prescribed any special form, (a) nor is the time precisely determined. But the notice must be given in a reasonable time; and that time will be reasonable which secures to the guarantor all rights and means of protecting himself. (b)

SECTION V.

OF THE CHANGE OF LIABILITY.

The guarantor cannot be held to any greater extent than the original debtor, either in point of amount or of time. (c) * Nor can this liability be extended or enlarged by operation of law without his consent. This would appear to be a plain and certain principle of law, although there are some cases which seem to oppose it. (d) If one becomes bound for the fidelity of an officer in a corporation created by a statute for a limited period, and after that expires the charter is renewed, but no new bond given, and no confirmation of the old one, it has been held in New Hampshire that the surety is still

(a) It is immaterial how the notice is given to the guarantor, whether by the party accepting the guaranty, or him in whose favor it is given. Reasonable *knowledge* on the part of the guarantor that his guaranty is accepted is sufficient. *Oakes v. Weller*, 16 Verm. 63, 13 Verm. 106; *Menard v. Scudder*, 7 Louis. Ann. 385. An acknowledgment by the guarantor of his liability, and a promise to pay, supersedes the necessity of proving notice. *Peck v. Barney*, 13 Verm. 93. But see *Reynolds v. Douglass*, 12 Pet. 497.

(b) What is a reasonable time, the facts not being in dispute, seems to be entirely a question of law, and not proper to be submitted to the jury. *Craft v. Isham*, 13 Conn. 28; *Howe v. Nickels*, 22 Maine, 175; *Lowry v. Adams*, 22 Verm. 160.

(c) *Walsh v. Bailie*, 10 Johns. 180; *Tunison v. Cramer*, 2 South. 498; *Clark v. Bush*, 3 Cow. 151; *United States v. Boyd*, 15 Pet. 187; *Fisher v.*

Salmon, 1 Cala. 413. The liability of the guarantor will be deemed coextensive with that of the principal, unless it be expressly limited. *Curling v. Chalklen*, 3 M. & S. 502. A guarantor is not bound beyond the fair import of the actual terms of his engagement. *Miller v. Stewart*, 9 Wheat. 680, 720; *Wardens of St. Saviour's v. Bostock*, 5 B. & P. 175; *Borden v. Houston*, 2 Tex. 594.

(d) Thus, in *Reed v. Fullum*, 2 Pick. 158, where a surety became bound for a poor debtor, "that he would not depart without the exterior bounds of the debtor's liberties," and at the time the bond was given the "debtor's liberties" extended through the whole county, but they were subsequently reduced to much more narrow limits, it was *held* that the surety was liable for the escape of the debtor, beyond the last mentioned limits, although he had not passed beyond the liberties as they existed when the bond was given.

bound. (e) But this question has been decided differently, *and more in accordance with the principles of the law of contracts, in Maryland. (f) There the surety was held to be

(e) *Exeter Bank v. Rogers*, 7 New Hamp. 21. The facts were that the Exeter Bank was incorporated by an act of the legislature, in the year 1803, to continue for the term of twenty years from January 1, 1804. In 1822 an additional act of the legislature was passed, which provided that the first act should remain and continue in force for a further term of twenty years from January 1, 1824; that there should be no division of the capital stock without the consent of the legislature, and that the bank should not have in circulation at any time bills exceeding in amount the capital stock actually paid; any cashier or other officer violating these provisions to forfeit not less than \$1,000, nor more than \$10,000. R. was appointed cashier of the bank in 1809, gave bond with sureties for the faithful discharge of the duties of the office, and continued cashier until 1830. It was held that the bond covered all the time which R. remained in office, and that the sureties were not discharged by any of the provisions in the additional act of the legislature. And *Richardson, C. J.*, in giving the opinion of the court, observed:—"The true rules of law to be deduced from all the cases on this subject, are these. When the term of office is limited to a particular period, as a year or five years, and the person appointed cannot continue in office for a longer period without a new appointment, then the official bond, if nothing appear to the contrary, is presumed to be intended to be confined to the particular term; and if the officer be re-appointed there must be a new bond. But when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment. Thus a sheriff is appointed in this State to hold his office during the term of five years, and cannot hold it beyond that term without a new appointment. The bond he gives does not therefore extend beyond the term for which he is appointed. But the

deputies of the sheriff hold their offices at the will of the sheriff, and their bonds may extend to any period during which they are continued in office, notwithstanding the sheriff may in the mean time be re-appointed, and be compelled to give new bonds himself. These rules are founded in sound reason and good sense. The presumption which the law makes as to the intention of the parties to the bond is the natural presumption in both cases. Now we are of opinion that the terms of the condition in this case are broad enough to embrace the whole term during which Rogers was cashier, and that there is nothing in the form of the appointment, the nature of the office, the words of the condition, or the conduct of the parties, that gives the slightest indication of any intention in any party that the bond should be limited to the period mentioned in the original charter as the termination of the corporation."

(f) *Union Bank v. Ridgely*, 1 Harr. & Gill, 324, which was an action against the sureties of a cashier for the faithful performance of his duties. The charter of the bank expired, and was extended by a new act of the legislature. The alleged default of the cashier occurred after the reënactment of the charter. The court held that where an act of incorporation, under which a bond was taken to secure the good conduct of one of the officers of the corporation, was limited in its duration to a certain period, the bond must have the same limitation; because, the parties looking to that act, it would seem to be very clear that no responsibility was contemplated beyond the period of its specified existence. The extension of the charter beyond the period of its first limitation by legislative authority does not enter into the contract, and cannot enlarge it. See *S. C. Society v. Johnson*, 1 McCord, 41. In the late case of *Bamford v. Iles*, 3 Exch. 380, a bond, reciting that A. was appointed assistant overseer of the parish of M., was conditioned for the due performance of his duties, "thenceforth from time to time, and at all times, so long as he should continue in such office." On the 25th June,

discharged, on the ground that his liability was exactly defined when he assumed it, and could not be enlarged or varied without his consent, either by the party receiving the guaranty or by the operation of law.

The Supreme Court of the United States have taken strong ground upon this point. They have decided that the surety is discharged not merely by payment of the debt or a release of the principal, but by any material change in the relations between the principal and the party to whom he owes a debt or duty; and that the surety cannot be held in such case by showing that the change was not injurious to him. For he had a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the very terms of his contract. (g)

* Any thing, therefore, which operates as a novation, discharges the surety. So if a new note be given in discharge of

1840, a vestry meeting was held, at which A. was elected assistant overseer until the 25th March, 1841, at a salary of 8*d.* in the pound on some sums collected, and 4*d.* on others. Two justices, by their warrant, dated 9th July, 1840, reciting the vestry resolution, and that his salary had been fixed for the execution of his office until the 25th March then next, stated, that in pursuance of the 59 Geo. 3, c. 12, they appointed him assistant overseer. On the 25th March, 1841, he was again elected to the same office, at a salary of £50 per annum, and was re-appointed by the justices, and he continued to be so re-elected and re-appointed by the justices until March, 1846. On ceasing to hold office, he retained moneys in his hands. *Held*, that the sureties were not liable on the bond. See also *Mayor of Berwick-upon-Tweed v. Oswald*, 16 E. L. & E. 236; *Frank v. Edwards*, 16 E. L. & E. 477 and note; *Jamison v. Cosby*, 11 Humph. 273.

(g) *Miller v. Stewart*, 9 Wheat. 680. In this case a bond was given, conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend

to another township, without the consent of the sureties. The court *held* that the surety was discharged from his responsibility for moneys subsequently collected by his principal. See also, *United States v. Tillotson*, Paine, 305; *United States v. Hillegas*, 3 Wash. C. C. R. 70; *Postmaster General v. Reece*, 4 Id. 678. In the late case of *Bonar v. McDonald*, 3 House of Lords Cases, 226, 1 E. L. & E. 1, in the House of Lords, the facts were, that in a bond by cautioners (sureties) for the careful attention to business and the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnership, nor be agent for any individual or copartnership in any manner or way whatsoever, nor be security for any individual or copartnership in any manner or way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, *he undertaking to bear one fourth part of all losses which might be incurred by his discounts*. *Held*, affirming the decision of a majority of the court below, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged,

a former one; (*h*) and it has been adjudged, upon good reasons, that where a surety is in fact discharged by a novation, or by a material change of the debt, and in ignorance of his being thus freed from his liability makes a subsequent acknowledgement of his liability, he cannot be held thereon. (*i*) But the guarantor may assent to the change, and waive his right of claiming a discharge because of it. (*j*)

In general, a guaranty to a partnership is extinguished by a change in the firm, although the copartnership name is not changed. (*k*) This has been held to be the effect of *such

notwithstanding that the loss arose, not from discounts, but from improper conduct of the agent.

(*h*) *Burge on Suretyship*, B. 2, ch. 5; *Letcher v. Bank of The Commonwealth*, 1 Dana, 82; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Bell v. Martin*, 3 Harr. 167; *Farmers and Mechanics Bank v. Kercheval*, 2 Mich. 504.

(*i*) *Merrimack Co. Bank v. Brown*, 12 New Hamp. 320; *Fowler v. Brooks*, 13 New Hamp. 240. See also *Roe v. Harrison*, 2 T. R. 425.

(*j*) *Fowler v. Brooks*, 13 New Hamp. 240. In this case it was determined that if a surety, with knowledge of the fact that an agreement for an extension of time has been made between the creditor and the principal, make a new promise to pay the debt, he cannot afterwards avail himself of the agreement, as a discharge of his liability, notwithstanding there was no new consideration for his promise.

(*k*) *Bellairs v. Ebsworth*, 3 Camp. 52; *Russell v. Perkins*, 1 Mason, 368; *Weston v. Barton*, 4 Taunt. 673. It was here held that a bond conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. *Mansfield, C. J.*, observed:—"The question here is, whether the original partnership being at an end, in consequence of the death of Golding, the bond is still in force as security to the surviving four; or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. . . . From

almost all the cases, in truth we may say from all, (for though there is one adverse case of *Barclay v. Lucas*, the propriety of that decision has been very much questioned,) it results that where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction; it is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying, or going out, may be the very person on whom the sureties relied; it would therefore be very unreasonable to hold the surety to his contract, after such change." See also *Bodenham v. Purchas*, 2 B. & Ald. 39. But in *New Haven County Bank v. Mitchell*, 15 Conn. 206, the facts were as follows. The guaranty of A., by its terms, made him responsible to B., a banking institution, for such paper as should be indorsed by the firm of S. M. & G., and held by B., and bound A. to save B. harmless from all loss which B. might sustain by reason of holding paper indorsed by said firm. The partnership of S. M. & G. was afterwards dissolved, of which B. had notice. The partners then executed a power of attorney to M., who had, previously to the dissolution, transacted nearly all the bank business of the partnership with B., authorizing him to sign and indorse

change, although the guaranty given to the firm was expressly for "advances by them, or either of them." The mere fact that the partnership is very numerous does not seem to vary this rule, if the guaranty be given to the whole firm. * But where the partnership was numerous, and seven of the members were trustees for the firm, and a bond was given to these trustees to secure the faithful services of the clerk of the company, and a part of the trustees died, there it was held that the surviving trustees might maintain an action on the bond, although it was shown that there had been changes in the company. (1)

A guaranty may doubtless be a continuing contract, and be unaffected by a change of circumstances, as to the subject-matter, and also as to the parties for whose benefit it shall enure. It may provide, for instance, for the fidelity of a cashier in a bank, as long as it shall continue under its

notes which might be considered necessary in the management of the concern. M. delivered the power to B.; after which, M., by virtue thereof, continued to use the name of S. M. & G., as drawers and indorsers of negotiable paper, which was discounted by B., and the proceeds credited to the firm, and applied in payment of their former indebtedness to B. By virtue of such power, M. also signed in the name of the firm various other notes which were indorsed by A., with notice of the dissolution, and knowing that these notes were intended to be, as they were in fact, discounted by B., and the proceeds applied in payment of the debts and liabilities of the firm. In the course of these transactions, M., by virtue of said power, indorsed two notes, which were discounted by B., and the proceeds credited to the firm. The parties to these notes having failed, B. sought a remedy on the guaranty against A.; and it was *held* that the guaranty, by its terms, contemplated only such paper as should be indorsed by the firm of S. M. & G., as a firm, and during the continuance of the partnership, but that, for the purpose of settling the partnership concerns, the partnership relation between the partners continued to subsist after the dissolution, and the notes so indorsed by M. were in legal contemplation indorsed by the firm; conse-

quently they were embraced within the scope and true meaning of the guaranty. And in *Staats v. Howlett*, 4 Denio, 559, A. gave B. an undertaking in writing as follows:—"I hereby obligate myself to hold you harmless for any indorsement you may make for, or have made for, the late firm of [Peck, Howlett & Foster." The firm had previously become dissolved by the death of one of its members. A note subsequently made by one of the surviving partners, in the course of liquidating the business of the firm, and signed "S. R. Howlett, for the late firm of Peck, Howlett & Foster," was indorsed by B. *Held*, that it was within the terms of the guaranty. The case of *Pemberton v. Oakes*, 4 Russ. 154, illustrates the principle of the text. See farther, that guaranties are to be construed strictly, and that if any partners be taken into or retire from a firm the guaranty does not continue. *Simson v. Cooke*, 8 Moore, 588; *Kipling v. Turner*, 5 B. & Ald. 261; *Wright v. Russell*, 3 Wils. 530; *Barclay v. Lucas*, 3 Doug. 321; *Penoyer v. Watson*, 16 Johns. 100; *Barker v. Parker*, 1 T. R. 287; *Dry v. Davy*, 2 P. & Dav. 249; *Place v. Delegal*, 4 Bing. N. C. 426; *Dance v. Girdler*, 4 B. & P. 34; *Myers v. Edge*, 7 T. R. 254.

(1) *Metcalf v. Bruin*, 12 East, 405.

present charter, and under any extension or renewal thereof. So provision may be made for its validity to a partnership after a change of members, perhaps by adequate covenants, even without the intervention of trustees; although it would certainly be the better, if not the only safe way, to constitute trustees. But, from what has already been said, it will be obvious that unless the contract of guaranty expressly provides for these changes, their occurrence discharges the guarantor from his obligation. (*m*)

So a bond for the good conduct of a clerk, when the obligee died and the executor employed the same clerk in arranging and finishing the business of the obligee, was not *held sufficient to maintain an action by the executor for misconduct of the clerk after the death of the obligee. (*n*)

In regard to the subject-matter, a guaranty to cover goods supplied to a certain amount, without restriction of time, continues until revoked; although even such continuing guaranty may be discharged by a change of the terms of credit. (*o*) If the guarantor means to limit his liability to a single

(*m*) The case of *Barclay v. Lucas*, 3 Doug. 321, 1 T. R. 291, n. a, although it has been doubted on some points, (see *Weston v. Barton*, 4 Taunt. 681,) is yet an authority for this principle, that if the terms of the contract show it was the intention of the parties that the liability should continue, such will be the case, although the names of the firm change. Such was evidently the court's understanding of the bond in that case, for Lord *Mansfield* observed:—"The question turns, as Lord Chief Justice De Grey observes, in the case which has been cited, upon the meaning of the parties. In endeavoring to discover that meaning, the subject-matter of the contract is to be considered. It is notorious that these banking-houses continue for ages with the occasional addition of new partners. In such establishments clerks are necessary, who now and then succeed as partners, an arrangement very proper and very beneficial to the clerks. The house requires security for their honesty. Now it seems to me to make no difference whether a new partner is introduced or not,

for there is no doubt that it is a security to the house. I am glad that there is a distinction between this case and that decided in the Common Pleas; for I think that the plaintiffs are entitled to recover to the extent of the whole sum embezzled, or at all events to the extent of their own share." This principle was the foundation of the decision in *Pease v. Hirst*, 10 B. & C. 122.

(*n*) *Barker v. Parker*, 1 T. R. 287.

(*o*) In *Bastow v. Bennett*, 3 Camp. 220, A. gave to B. a written guaranty to the extent of £300 for any goods he might supply to C., provided C. neglected to pay in due time. B. supplied goods to C. accordingly at two months credit, and C. paid in due time to an amount exceeding £300. The account having run for some time on these terms, and there being a balance due to B., a new account was opened on new terms of credit. *Held*, that the guaranty extended to all goods furnished while the term of credit remained unchanged, but not to those furnished after the term of credit was changed, and a new account opened.

transaction, he should so express it. (*p*) Still, if this purpose may fairly be gathered from the whole contract, courts will so construe it. (*q*)

(*p*) *Merle v. Wells*, 2 Camp. 413. In this case the guaranty was in these words:—"Gentlemen, I have been applied to by my brother, William Wells, jeweller, to be bound to you for any debts he may contract, not to exceed one hundred pounds, (with you) for goods necessary in his business as a jeweller. I have wrote to say by this declaration I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding one hundred pounds, after this date. (Signed,) John Wells." And Lord *Ellenborough* said: "I think the defendant was answerable for any debt not exceeding one hundred pounds which William Wells might from time to time contract with the plaintiffs in the way of his business. The guaranty is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing he should take care to say so. By such an instrument as this a continuing suretyship is created to the specified amount. There must be, therefore, a verdict for the plaintiffs for £100."

(*q*) See *Cremor v. Higginson*, 1 Mason, 323, which is a leading case on this subject. In this case the letter of guaranty contained this clause:—"The object of the present letter is to request you, if convenient, to furnish them" (Messrs. Stephen and Henry Higginson,) "with any sum they may want, as far as fifty thousand dollars; say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." It was *held*, that this was not an absolute original undertaking, but a guaranty; that it covered advances only to Stephen and Henry Higginson (who were then partners,) on partnership account, and could not be applied to cover advances to either of the partners separately, on his separate account; that the authority of the guaranty was revoked by a dissolution of the partnership, and no subse-

quent advances made by the party, after a full notice of such dissolution, were within the reach of the guaranty; that the letter did not import to be a continuing guaranty for money advanced, *toties quoties*, from time to time, to the amount of \$50,000, but for a single advance of money to that amount; and that, when once advances were made to \$50,000, no subsequent advances were within the guaranty; although, at the time of such further advances, the sum actually advanced had been reduced below \$50,000, by reimbursements of the debtors. In *Grant v. Ridsdale*, 2 Har. & Johns. 186, a guaranty in the following terms:—"I will guaranty their engagements, should you think it necessary, for any transactions they may have in your house," was *held* an absolute and continuing guaranty, until countermanded.—So where the defendant addressed a letter to the plaintiffs, stating that his brother wished to go into business, and promising to be accountable for such goods furnished by the plaintiffs as his brother should call for, from \$300 to \$500 worth; in consequence of which the plaintiffs furnished him with divers parcels of goods; it was *held* that this was a continuing guaranty to the amount specified, and was not limited to the bill of parcels first delivered. *Rapelye v. Bailey*, 5 Conn. 149. See also *Clark v. Burdett*, 2 Hall, 197.—A writing in these words, "I agree to be responsible for the price of goods purchased of you, either by note or account, at any time hereafter, to the amount of \$100," is a continuing guaranty to that extent, for goods to be at any time sold before the credit is recalled. *Bent v. Hartshorn*, 1 Met. 24.—Many of the cases seem to hold with Lord *Ellenborough*, in *Merle v. Wells*, 2 Camp. 413, that the guaranty will be understood to be continuing, unless expressly limited. But the contrary opinion was expressed in *White v. Reed*, 15 Conn. 457. In that case the defendant gave the plaintiff a writing in these words, "For any sum that my son G. may become indebted to you, not exceeding \$200, I will hold myself accountable." *Held*, that the terms of this instrument were satisfied when any in-

SECTION VI.

HOW A GUARANTOR IS AFFECTED BY INDULGENCE TO A DEBTOR.

A guarantor is entitled to a just protection. But this principle is not carried so far as to permit him to compel the creditor unreasonably to proceed against the principal debtor. (r) From some cases it may be doubted whether he has any power in this way. In one case, (s) it was held that a surety, who was injured by a delay in suing the principal debtor, was not discharged, on the ground that he might have insured a prompt demand against the debtor, by making himself an indorser instead of a surety. But this would have secured only a demand, and not a suit; and it seems hard and severe to say that because one does not secure to him-

debtedness within the amount limited was incurred by G., and consequently that it was not a continuing guaranty. So in *Boyce v. Ewart*, 1 Rice, 126, the guaranty was in these words, "The bearer is about to commence business, to assist him in which he will need your aid, which if you render, we will, in case of failure, indemnify you to the amount of \$4,000." Held, that it was not a continuing guaranty, but applicable to the bearer's commencing in business, and that, as soon as the bearer had refunded \$4,000, the guaranty ceased. In *Fellows v. Prentiss*, 3 Denio, 512, a guaranty in these words: "I hereby agree to guaranty to you the payment of such an amount of goods, at a credit of one year, interest after six months, not exceeding \$500, as you may credit to A.," was held not to be a continuing guaranty, but it was held to be exhausted by a single purchase of goods to the amount of \$500. See also *Whitney v. Groot*, 24 Wend. 82; *Lawrence v. McCalmont*, 2 How. 426; *Chapman v. Sutton*, 2 C. B. 634; *Tanner v. Moore*, 11 Jur. 11; *Allnut v. Ashenden*, 5 M. & Gr. 392; *Hitchcock v. Humphrey*, 5 M. & Gr. 559; *Martin v. Wright*, 9 Jur. 178; *Johnston v. Nicholls*, 1 C. B. 251; *Farmers & Mechanics Bank v. Kercheval*, 2 Mich. 504; *Agawam Bank v. Strever*, 16 Barb. 82.

(r) It seems to be well settled that mere delay by the creditor to proceed

against the principal, although requested to do so by the surety, will not in and of itself discharge the surety. *Huffman v. Hulbert*, 13 Wend. 377; *Davis v. Higgins*, 3 New Hamp. 231; *Bel lows v. Lovell*, 5 Pick. 307; *Erie Bank v. Gibson*, 1 Watts, 143; *Cope v. Smith*, 8 S. & R. 110; *Johnson v. Planters Bank*, 4 S. & M. 165. But if this delay of the creditor operates to the injury of the surety, as if the principal debtor was at the time of the request solvent, but afterwards became insolvent, and the surety will not be able to collect the amount, he is *pro tanto* discharged. *Row v. Pulver*, 1 Cow. 246; *State v. Reynolds*, 3 Miss. 95; *Herrick v. Borst*, 4 Hill, 650. And see note (w) *post*.

(s) *Townsend v. Riddle*, 2 N. Hamp. 448. And *Woodbury, J.*, said:—"Here the character of the defendant as a surety did not appear on the face of the contract, nor was it proved that the plaintiff knew him to be only a surety. Here he was not liable as a mere indorser on the same instrument, or as a guarantor on a separate one. No time for an adjustment with the principal was fixed by law; no delay was given to him after a request by the surety for a prosecution; no new engagement for forbearance appears to have been entered into between the creditor and debtor."

self the precise and immediate demand and notice necessary to hold indorsers, he shall not be entitled to any care or diligence on the part of the creditor.

If the surety requests the creditor to collect the debt, and there is refusal and delay, and subsequent insolvency, it would seem difficult to resist the surety's claim to be discharged. (*t*) In 1816 it was said by the Supreme Court of New York, in a case where such facts were pleaded and demurred to, that the plea was good, and the defence sufficient. (*u*) Chancellor Kent has questioned the law of this

(*t*) In the *Trent Navigation Co. v. Harley*, 10 East, 35, Lord *Ellenborough* said:—"The only question is, whether the laches of the obligees, in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law [in an action] against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity." And in *Dawson v. Lawes*, 23 E. L. & E. 374, the Vice-Chancellor said that in order to discharge sureties for the faithful performance of duties by their principal, from their obligation, there must be such an act of connivance as enabled the party to get the fund in his hands, or such an act of gross negligence as to amount to a wilful shutting of the person's eyes to the fraud which the party was about to commit, or something approximating to it.

(*u*) *Pain v. Packard*, 13 Johns. 174. And see *People v. Jansen*, 7 Johns. 336. In *Herrick v. Borst*, 4 Hill, 650, it was held that although the creditor neglect to prosecute the principal, after a request by the surety, this will not discharge the surety, if the principal was then insolvent. And the surety, in order to establish a defence of this kind, must show *clearly* that at the time the request was made the debt could have been collected of the principal. *Cowen, J.*, then observed:—"The view taken of the question in *Huffman v. Hulbert*, 13 Wend. 377, the only case in this court where the kind or degree of insolvency on which the surety is to be discharged has been noticed, is not inconsistent with the direction given at the circuit. Mr. Justice Nelson there said, the rule is founded on the assumption

that the debt is *clearly* collectable by suit; and upon this ground only can the rule be defended. Again, he says, there must be something more than an ability to pay at the option of the debtor. Among other reasons he mentions the surety having a remedy of his own by payment and suit, a reason which, as I mentioned, would in other cases, deprive the party complaining of all claim; for in no other case that I am aware of can he demand compensation or raise a defence grounded on his own neglect. What principle such a defence should ever have found to stand upon in any court it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent, (*Pain v. Packard*, 13 Johns. 174,) was afterwards repudiated even by the Court of Chancery, (*King v. Baldwin*, 2 Johns. Ch. Rep. 554,) as it always has been both at law and equity in England; but was restored on a tie in the Court of Errors, turned by the casting vote of a layman. *King v. Baldwin*, 17 Johns. 384. *Platt, J.*, and *Yates, J.*, took that occasion to acknowledge they had erred; in *Pain v. Packard*, as Senator Van Vechten showed most conclusively that the whole court had done. The decision was obviously erroneous in another respect, as was also shown by that learned senator. It overruled a previous decision of the same court in *Le Guen v. Gouverneur*, 1 Johns. Cas. 492, on the question of *res judicata*; necessarily so, unless it be conceded that the defence belongs exclusively to equity. I do not deny that the error has become inveterate, though it has never been treated with much favor. A *dictum* was referred to on the argument, in the

case, and it is said that two of the judges of the court afterwards retracted their opinion. But in 1833, the Supreme Court of the same State seemed to hold the same views. In 1811 this court decided that a mere delay in calling on the principal will not discharge the surety. (*v*) Of this there seems no question; and the objection to discharging him where he requests a collection of the debt and is injured by the refusal, rests upon the right and power of the surety to pay the debt himself whenever he pleases, and then take his own measures against the debtor. It would be, however, unjust to hold him liable on this ground, where he has been injured by the certain fault of the party to whom he makes the guaranty (*w*) And from a consideration of the cases, and the reasons on which they rest, we think this rule may be drawn;—that a surety is discharged where the creditor,

Manchester Iron Manuf. Co. *v.* Sweeting, 10 Wend. 162, that the refusal to sue is tantamount to an agreement not to prosecute the surety. The remark meant, however, no more than that such a neglect as amounts to a defence is like the agreement not to sue in respect to being receivable under the general issue. The judge was speaking to the question whether the defence should not have been specially pleaded as it was in *Pain v. Packard*. On the other hand, it has often been said that the defence should not be encouraged, but rather discountenanced; and several decisions will be found to have proceeded on this ground."

(*v*) *People v. Jansen*, 7 Johns. 336. The authorities all agree upon this point. *Hunt v. United States*, 1 Gallis. 32; *Naylor v. Moody*, 3 Blackf. 93; *Hunt v. Bridgham*, 2 Pick. 581; *Winter v. Branch Bank*, 23 Ala. 762. And even an agreement by the creditor to enlarge the time, unless it is made upon such consideration, or in such form as to be binding upon him, and to estop him from suing the principal, does not discharge the surety. *Leavitt v. Savage*, 16 Maine, 72; *Bailey v. Adams*, 10 New Hamp. 162; *Joslyn v. Smith*, 13 Verm. 353; *Harter v. Moore*, 5 Blackf. 367; *Farmers Bank v. Reynolds*, 13 Ohio, 84. And see note (*y*) *post*.

(*w*) The better authorities agree that if the surety can positively and clearly

show an injury to himself by the failure of the creditor to prosecute after request, he is exonerated, *pro tanto*. *Row v. Pulver*, 1 Cow. 246; *State v. Reynolds*, 3 Miss. 95; *Manchester Iron Co. v. Sweeting*, 10 Wend. 162; *Goodman v. Griffin*, 3 Stew. 160; *Hogaboom v. Herrick*, 4 Verm. 131; *Johnston v. Thompson*, 4 Watts, 446; *Wetzel v. Sponsler's Exrs.* 18 Penn. 460; *Lang v. Brevard*, 3 Strob. Eq. 59. In *Locke v. United States*, 3 Mason, 446, it was held that the neglect of the postmaster-general to sue for balances due by postmasters, within the time prescribed by law, although he thereby is rendered personally chargeable with such balances, is not a discharge of the postmasters or their sureties upon their official bonds. And in *Bellows v. Lovell*, 5 Pick. 307, the Supreme Court of Massachusetts held that a refusal of the creditor to sue the principal upon a mere request of the surety, unaccompanied with an offer of indemnity against the costs and charges of the suit, is not a defence at law to a suit against the surety, notwithstanding the principal may afterwards have become insolvent. So in *Davis v. Huggins*, 3 New Hamp. 231, where one who had signed a promissory note as surety requested the payee to collect the money of the principal, but the payee neglected so to do until the principal became insolvent; it was held that the surety was not discharged.

after notice and request, has been guilty of a delay which amounts to gross negligence, and by this negligence the surety has lost his security or indemnity. If, however, in that case the creditor could show full knowledge and an equal negligence on the part of the guarantor, it would be difficult to point out any acknowledged principles which would lead to his discharge. (*x*)

A guarantor or surety has a right to expect that the creditor will not wantonly lose or destroy his claim against the principal debtor, with the intention of falling back upon the liability of the guarantor. (*xx*) For the guarantor promises only to pay the debt of another, in case that other does not pay it; and this contract is held to imply some endeavor and some diligence on the part of the creditor to secure the debt from the principal debtor. To this the guarantor is entitled; but this does not give him the right to debar the principal debtor from all favor or indulgence. It was once uncertain whether a forbearance of the debt did not discharge the guarantor; but it is now well settled that a mere forbearance, leaving to the creditor the power of putting his claim in suit at any time, does not have this effect. (*y*) Thus, the neglect

(*x*) And it has been expressly held, that if the extension of payment is given to a principal, at the instance of the surety or with his consent, the surety is not discharged. *Suydam v. Vance*, 2 McLean, 99; *Solomon v. Gregory*, 4 Harr. 112; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119. See also *Day v. Ridgway*, 17 Penn. 303. Or if the surety, being informed of such an arrangement, assents to it, it is no defence to him. *Tyson v. Cox, T. & R.* 395; *Smith v. Winter*, 4 M. & W. 519; *La Farge v. Herter*, 11 Barb. 159; *Woodcock v. Oxford & Worcester Railway Co.* 21 E. L. & E. 285. Or if the surety has been amply secured and indemnified by the principal, even if the extension was made without his consent. *Smith v. Estate of Steele*, 25 Verm. 427. Otherwise if he assents in ignorance of the real facts. *West v. Ashdown*, 1 Bing. 164; *Robinson v. Offutt*, 7 Monroe, 541. See also *ante*, p. -505, and n. (*i*.)

(*xx*) *N. H. Savings Bank v. Colcord*, 15 N. H. 119; *Holt v. Bodey*, 18 Penn.

207; *Perrine v. Fireman's Ins. Co.* 22 Ala. 575.

(*y*) It is well settled that mere delay without fraud, or agreement with the principal, does not discharge the surety. *Hunt v. United States*, 1 Gallison, 32; *Naylor v. Moody*, 3 Blackf. 93; *Hunt v. Bridgman*, 2 Pick. 581; *Townsend v. Riddle*, 2 New Hamp. 448; *Leavitt v. Savage*, 16 Maine, 72; *Freeman's Bank v. Rollins*, 13 Maine, 202; *Johnston v. Searcy*, 4 Yerg. 182; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Montgomery v. Dillingham*, 3 S. & M. 647; *People v. White*, 11 Ill. 342; *Dorman v. Bigelow*, 1 Flor. 281. To have such effect, there must be an actual agreement between the creditor and the principal to extend the time of payment. *Hutchinson v. Moody*, 18 Maine, 393; *Fuller v. Milford*, 2 McLean, 74; *Greely v. Dow*, 2 Met. 176; *Wagman v. Hoag*, 14 Barb. 232. And the agreement must be upon sufficient consideration, and must amount in law to an estoppel upon the creditor, sufficient to prevent him from beginning a suit be-

of postmasters to sue for balances due them does not discharge their sureties. (z) Where a creditor received the interest in advance for sixty days, this did not discharge the surety; for though it undoubtedly signified that the debt was not to be demanded within that period, yet it might have been at any moment. (a) So where a bank, renewed a note on receiving twenty five per cent., and the interest on the remainder for a certain period, the note lying in the bank overdue, the surety was not discharged. (b)

fore the expiration of the extended time; and when such an agreement is made the surety is discharged. *Leavitt v. Savage*, 16 Maine, 72; *Bailey v. Adams*, 10 New Hamp. 162; *Hoyt v. French*, 4 Foster, 198; *Joslyn v. Smith*, 13 Verm. 353; *Wheeler v. Washburn*, 24 Verm. 293; *Chace v. Brooks*, 5 Cush. 43; *Hoffman v. Coombs*, 9 Gill, 284; *Payne v. Commercial Bank*, 6 S. & M. 24; *Newell v. Hamer*, 4 How. (Miss.) 684; *Coman v. State*, 4 Blackf. 241; *Farmers Bank v. Reynolds*, 13 Ohio, 84; *Haynes v. Covington*, 9 S. & M. 470; *Anderson v. Mannon*, 7 B. Monr. 217; *Sawyer v. Patterson*, 11 Ala. 523; *Gray's Exrs. v. Brown*, 22 Ala. 262; *Moss v. Hall*, 5 Exch. 46; *Phillips v. Rounds*, 33 Maine, 357; *Thomas v. Dow*, Ib. 390; *Turrill v. Boynton*, 23 Verm. 192; *Bangs v. Strong*, 4 Coms. 315; *Miller v. Stem*, 12 Penn. 383; *Mitchell v. Cotten*, 3 Florida, 134; *Burke v. Cruger*, 8 Tex. 60. Therefore a surety in a *specialty* is not discharged by a parol agreement between the creditor and the principal, on the day the debt became due, to allow the principal one year more for payment. *Tate v. Wymond*, 7 Blackf. 240. But the agreement for extension must not only be valid and binding in law, but the time of the extension must be definitely and precisely fixed. *Miller v. Stem*, 2 Barr, 286; *Parnell v. Price*, 3 Rich. 121; *Wadlington v. Gary*, 7 S. & M. 522; *Gardner v. Watson*, 13 Ill. 347; *Waters v. Simpson*, 2 Gilman, 570; *People v. McHatton*, Ib. 638; *McGee v. Metcalf*, 12 S. & M. 535. And the sureties are not discharged by the giving of time to the principal, if a right has been reserved, in the contract to proceed against the sureties at any time. *Wyke v. Rogers*, 12 E. L. & E. 163; *Viele v. Hoag*, 24 Verm. 46;

Hubbell v. Carpenter, 1 Seld. 171; *Wagman v. Hoag*, 14 Barb. 232.

(z) See *Locke v. United States*, 3 Mason, 446, cited *ante*, in note (w) p. 511.

(a) *Oxford Bank v. Lewis*, 8 Pick. 458.

(b) *Blackstone Bank v. Hill*, 10 Pick. 129. And the ground of this decision is thus stated by the court: "The first objection that an extension of credit was given to the principal without the consent of the surety, if made out would be a good defence, but it is not supported in point of fact. The principle is stated in *Oxford Bank v. Lewis*, 8 Pick. 458, that to discharge the surety, the contract for new credit must be such as will prevent the holder of the note from bringing an action against the principal. The plaintiffs were not precluded, during such supposed renewed term of credit, from suing the principal, in the case under consideration. As to the understanding that the plaintiffs were not to collect the note unless they should want money, that was a matter of courtesy rather than of legal obligation. The strongest circumstance showing a renewed credit is the receiving of interest in advance; but in the case of *Oxford Bank v. Lewis*, where that point was directly adjudged, it was held that that circumstance did not tie the hands of the plaintiffs, if at any time they thought it necessary for their security to bring an action." See also *Strafford Bank v. Crosby*, 8 Greenl. 191. But these cases seem to rest on the ground of usage of the bank, and that the same was known to the sureties, and acquiesced in by them. And it was accordingly held in *Crosby v. Wyatt*, 10 New Hamp. 318, that if a note is made payable to a bank, where a regular usage

It seems to be settled that an express covenant not to sue the principal debtor within a *limited* time does not discharge the surety; because a suit may nevertheless be commenced at any time, and such a covenant is no bar, but only gives to the covenantee an action for damages. (c) But where there is an entry on the docket of the court, made by counsel, to the effect that no action shall be brought on the original debt, this discharges the surety, because it will be enforced by the court, and no such action will be permitted. It is therefore equivalent to a discharge of the debt by the creditor, which of course operates the discharge of the guarantor. (d) Such an arrangement made with the principal debtor without the consent of the surety, although innocently done, may work an injury to the surety.

SECTION VII.

OF NOTICE TO THE GUARANTOR.

A guaranty may be extinguished or discharged by the fact that the guarantee gives no notice to the guarantor of the failure of the principal debtor, and of the intention of the guarantee to enforce the guaranty. For a guarantor is entitled to reasonable notice of this. What the notice should be, or when it should be given, is not settled in the case of a

exists to receive payment by instalments, at regular intervals, with the interest on the balance in advance, there is presumptive evidence of the assent of a surety that payment may be delayed, and received by instalments according to such usage, until the contrary is shown. But this principle cannot be held to apply to any delay beyond such regular usage, and no assent to any other course can be presumed. A similar doctrine was held in *Savings Bank v. Ela*, 11 New Hamp. 336. So in *Gifford v. Allen*, 3 Met. 255, it was determined that if the holder of a note payable on demand makes a valid agreement with the principal promisor, without the consent of the surety, to receive

payment by yearly instalments, he thereby discharges the surety.

(c) *Perkins v. Gilman*, 8 Pick. 229. And in *Fullam v. Valentine*, 11 Pick. 156, where the defendant was arrested on mesne process and gave bail, and the plaintiff, before judgment was rendered, covenanted not to arrest him on any writ or execution within four months, it was held that the bail was not thereby discharged, for the covenant was only collateral to the action, and did not deprive the plaintiff of the power to arrest the defendant, nor the bail of the power to surrender him, within the four months.

(d) *Fullam v. Valentine*, *supra*.

mere guarantor as it is in the case of an indorser, but the reason and justice are the same in both cases, and equally require notice, in order that the guarantor may at once take what measures are within his power, to secure or indemnify himself. The question of reasonable time is a question of law, and the cases are very few which would help us in determining what time would be reasonable. But, from the authorities and the reason of the thing, we deduce these rules; the guarantor is entitled to this notice, but cannot defend himself by the want of it, unless the notice and demand have been so long delayed as to raise a presumption of waiver or of payment, or unless he can show that he has lost by the delay opportunities for obtaining securities which a notice or an earlier notice would have given him. In this latter case a very brief delay, of a day or two only, might be fatal to the claim of the guarantee, if it appeared that notice could easily have been given, and would have saved the guarantor from loss. The question would be, in such a case, was there actual negligence, causing actual injury. (*dd*)

A demand on the principal debtor, and a failure on his part to do that which he was bound to do, are requisite to found any claim against the guarantor; and notice of the failure, as we have said, must be given to him. (*e*) But if the guaranty is for the payment of a note, and is absolute and unconditional, it has been held that neither demand nor notice is necessary to charge the guarantor; (*ee*) but we should have some question of this.

(*dd*) *Oxford Bank v. Haynes*, 8 Pick. 423; *Thomas v. Davis*, 14 Pick. 353; *Talbot v. Gay*, 18 Pick. 534; *Whiton v. Mears*, 11 Metc. 563; *Farmers & Mechanics Bank v. Kercheval*, 2 Mich. 505; *Bickford v. Gibbs*, 8 Cush. 154.

(*e*) *Ibid*; *Douglass v. Reynolds*, 7

Peters, 114. But this demand and notice may be waived by the surety in his guaranty. *Bickford v. Gibbs*, 8 Cush. 154.

(*ee*) *Read v. Cutts*, 7 Greenl. 186; *Breed v. Hillhouse*, 7 Conn. 523; *contra*, *Greene v. Dodge*, 2 Ham. 498.

SECTION VIII.

OF GUARANTY BY ONE IN OFFICE.

If a guaranty be made by one expressly in an official or special capacity, as attorney, executor, guardian, assignee, * trustee, churchwarden, or the like; and the guarantor holds such office, and has a right to give the guaranty in his official capacity, then he is only bound in that capacity. But if he does not hold such office, or if he holds the office, but has no right to give the guaranty in that capacity, then he is personally liable, and such designation is merely surplusage, or words of description. (*f*)

SECTION IX.

OF REVOCATION OF GUARANTY.

A promise of guaranty is always revocable at the pleasure of the guarantor by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount, and after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has, in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract enforceable at law to deliver the residue. And if the guaranty be to indemnify for misconduct of an officer or servant, this promise is revocable, provided the circumstances are such that

(*f*) *Redhead v. Cator*, 1 Stark. 14; *pleton v. Binks*, 5 East, 148; *Sumner Hall v. Ashurst*, 1 Cr. & M. 714; *Burrell v. Jones*, 3 B. & Ald. 47 - 51; *Ap- v. Williams*, 8 Mass. 162.

when it is revoked the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties.

It seems, however, that a distinction is taken between the power of revocation, when the guaranty is given by parol contract, and when it is under seal. In the former case this power is very broadly asserted, but in the latter it is almost wholly denied. An eminent judge says, indeed, that there *are no means, or mode of revocation of guaranty under seal. (g) But whether this is strictly true may well be doubted.

(g) Lord *Ellenborough*, in *Hassell v. Long*, 2 M. & S. 370. And see *Bayley, J.*, in *Calvert v. Gordon*, 7 B. & C. 809. So in *Hough v. Warr*, 1 C. & P. 151, *Abbott, C. J.*, expressed the opinion, that in a court of law a letter of revocation to the obligee would be of no avail, but that the proper court for relief was a court of equity.

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CHAPTER IX.

HIRING OF PERSONS.

Sect. I. — *Servants.*

IN England, a domestic servant who is turned away without notice, and without fault, is entitled to one month's wages, although there be no agreement to that effect. (*h*)

(*h*) *Robinson v. Hindman*, 3 Esp. 235. And this is on the ground that a *general* hiring, that is to say, a hiring without any engagement as to the duration of the service, is *presumed* to be a hiring *for a year*, and it will be construed in a court of law to be a hiring on the terms that either party might determine the engagement upon giving a month's notice, and the law implies a promise by the master to pay a month's wages, if he dismiss his servant without cause, without giving such notice. See *Fawcett v. Cash*, 5 B. & Ad. 904; *Lilley v. Elwin*, 11 Q. B. 754; *Nowlan v. Ablett*, 2 C. M. & R. 54; *Beeston v. Collyer*, 4 Bing. 309, 2 C. & P. 607; *Spain v. Arnott*, 2 Stark. 257; *Huttman v. Boulnois*, 2 C. & P. 511; *Holcroft v. Barber*, 1 C. & K. 4; *Baxter v. Nurse*, 1 C. & K. 10. But this presumption of a yearly hiring may be rebutted by evidence showing that such was not the intention of the parties. *Bayley v. Rimmell*, 1 M. & W. 506. This was an action by an assistant surgeon, against his employer, to recover the amount of salary due him in that capacity. The plaintiff claimed for salary for a hundred and sixty-one days, at the rate of £200 per annum, and he so described his claim in the particulars of his demand annexed to the record. No specific contract of hiring was proved, but evidence was given of the service. It appeared that after the plaintiff had been some time in the defendant's employment, he was taken ill, and went to

a hospital, where he remained three months. He did not return to his employment, nor did the defendant request him to do so. It appeared that the plaintiff had been paid different sums of money, but not at any fixed or definite periods. It was submitted that upon this evidence it must be taken to be a general hiring, and that in legal estimation that was a hiring for a year, and therefore that no wages were recoverable, as the year's service had not been performed. *Sed non allocatur*; and *Parke, B.*, in giving the opinion of the court, observed:—"Admitting that there was some evidence of a hiring, and agreeing in the proposition that a general hiring, if unexplained, is to be taken to be a hiring for a year, I think there is abundant evidence in this case to show that there was no hiring for a year. It appears that payments were made, but they were not made according to the yearly amount, nor at any definite periods of the year. The parties separated in the middle of the year, and neither did the plaintiff return, nor did the defendant require him to return and complete the service. If, indeed, the jury ought to have found whether this was a yearly hiring, the learned judges should have been required to leave that question to them; but there is really nothing to show that the compensation was to be paid at the end of the year." The presumption of a yearly hiring is not a presumption of law, but of fact merely. *Cresswell, J.*, in

We are not aware that a similar rule exists in this country; but where the wages are payable at definite periods, as by the week or by the month, the contract for each period would perhaps be considered as so far entire, that a servant leaving without cause after the month had commenced could not recover wages for his services within that month; and a master turning off his servant without cause would be bound to pay him his wages through the month. This, however, may be doubted unless there was some agreement expressed or distinctly inferable from the contract, or a custom or usage were proved which the parties might be considered as having contemplated. (i)

Baxter v. Nurse, 6 M. & Gr. 941, and the presumption of a yearly hiring does not arise, where the services of the servant is expressed to be at the will of either party; as where a boy was hired by a farmer, for his meat and clothes, "*so long as he had a mind to stop*." *Rex v. Christ's Parish, York*, 3 B. & C. 459. See also *Rex v. Great Borden*, 7 B. & C. 249. There was formerly a doubt whether a contract to serve *during life* was valid, but it seems that such contract is not itself illegal. *Lord Abinger*, in *Wallis v. Day*, 2 M. & W. 281. See farther, 1 Bl. Com. 425, n. 1, *Christian's* ed.

(i) In England this doctrine rests on the ground that the parties may make the contract with reference to *general usage*, which thereby becomes a part of the contract. See *Turner v. Robinson*, 5 B. & Ad. 789; *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171. In this country it has been *held* that a contract to work "for eight months for \$104, or \$13 a month," was so far an entire contract that if the plaintiff left without cause, before the eight months, he could not recover for any part of the time; and although he had worked more than a month, he was not allowed to recover for a month, since there was no provision that he should be paid monthly. *Reab v. Moor*, 19 Johns. 337. So, where the plaintiff agreed to work for the defendant "*seven months, at \$12 per month*," it was *held* that this was an entire contract; that \$84 were to be paid at the end of the seven months, and not \$12 at the end of each month; and that if the plaintiff left without good cause, before the seven months

were expired, he could not recover any thing for his services, although the defendant had paid a part during the continuance of the service. *Davis v. Maxwell*, 12 Met. 286. In this case, *Hubbard, J.*, said:—"In regard to the contract itself, which was an agreement to work for the defendant for seven months, at twelve dollars per month, we are of opinion that it was an entire one, and that the plaintiff, having left the defendant's service before the time expired, cannot recover for the partial service performed; and that it differs not in principle from the adjudged cases of *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Pick. 528; and *Thayer v. Wadsworth*, 19 Pick. 349; which we are unwilling to disturb, upon mere verbal differences between the contracts in those cases and in this, which do not affect its spirit. The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But however reasonable such a contract might be, it is not, we think, the contract which is proved. There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other; and not performance and full payment for the part performed. The rate per month is stated, as is common in such contracts, as fixing the rate of payment, in case the contract should be given up by consent, or death or other casualty should determine it before its expiration, without affecting the right

Where the contract is for a time certain, if the master discharge the servant before the time, he is still liable, unless the servant have given cause, by showing himself unable or unwilling to do what he has undertaken to do. (j) A pro-

of the party. Such contracts for hire, for definite periods of time, are reasonable and convenient, are founded in practical wisdom, and have long received the sanction of the law. It is our duty to sustain them when clearly proved.⁵ See also *Eldridge v. Rowe*, 2 Gilman, 91. So in *Nichols v. Coolahan*, 10 Met. 449, where a contract was made by N. and C., that N. should have eleven dollars per month and board, so long as he should work for C.; C. informing N. that he (C.) might not have two days' work for him. N. worked for C. several months, and brought an action for his wages, and annexed to his writ a bill of particulars, in which he charged the price agreed on per month, and gave C. credit for a certain sum on account of three weeks' sickness of N., during which time he was unable to work. C. filed in set-off an account against N. for board during his sickness. *Held*, that the contract was a hiring by the month; that C. was not entitled to payment for N.'s board during his sickness; but that N. could not recover wages during any part of the time of his detention from work by sickness.—And wherever the contract shows that the hiring was intended for a longer term, as for a year, the mere reservation of wages for a shorter term, as so much per week, or per month, will not control the hiring. Thus, where a farm servant was hired for a year, at three shillings a week, with liberty to go at a fortnight's notice, the contract was held to be a hiring for a year, the fortnight's notice plainly showing that it was not a weekly hiring. *Rex v. Birdbrooke*, 4 T. R. 245. In England, in the hiring of domestic servants for a year, there is generally an implied condition arising from general custom, that the contract may be determined by a month's notice to quit, and if the servant leave without such notice, and without the fault of his master, he can recover nothing for his services. See *Hartley v. Cummings*, 5 C. B. 247; *Pilkington v. Scott*, 15 M. & W. 657; *Archard v. Hornor*, 3 C. & P. 349; *Johnson v. Blekensop*, 5 Jurist, 870; *Now-*

lan v. Ablett, 2 C. M. & R. 54; *De-Briar v. Minturn*, 1 Calaf. 450. But it has been held in this country that where one enters into the service of employers, under no express agreement to continue in their service for any definite time, but with a knowledge of a regulation adopted by them requiring that all persons employed by them shall give them four weeks' notice of an intention to quit their service, he does not forfeit his wages by quitting their service without giving such notice; but he is liable to them for all damages caused by his not giving the notice; and in a suit against them for his wages, the amount of such damages may be deducted therefrom. *Hunt v. The Otis Company*, 4 Met. 464.

(j) It seems that where a servant is hired for a year, or other fixed period, at an entire sum, and is discharged by his employer, *without cause*, during the term, he may at the end of the time recover for the whole time, according to the contract. *Gandell v. Pontigny*, 4 Camp. 375; *Costigan v. The Mohawk & Hudson Railroad Co.* 2 Denio, 609; *Cox v. Adams*, 1 N. & McC. 284; *Clancey v. Robertson*, 2 Rep. Con. Ct. 404; *Byrd v. Boyd*, 4 McCord, 246. It seems, however, that the action in such case should be *special*, and not for work and labor done. *Fewings v. Tisdal*, 1 Exch. 295; *Archard v. Hornor*, 3 C. & P. 349; *Smith v. Hayward*, 7 Ad. & El. 544; *Broxham v. Wagstaffe*, 5 Jurist, 845; *Hartley v. Harman*, 11 Ad. & El. 798. But if the servant obtains work elsewhere, during the continuance of the term for which he was originally employed by the defendant, this ought, and probably would, reduce the damages to which the servant would otherwise be entitled by such wrongful dismissal. *Stewart v. Walker*, 14 Penn. 293. And see *Costigan v. The Mohawk & Hudson R. R. Co.* 2 Denio, 617, *Beardsley, J.*; *Hoÿt v. Wildfire*, 3 Johns. 518; *Emerson v. Howland*, 1 Mason, 51. In *Goodman v. Pocock*, 15 Q. B. 576, a clerk dismissed in the middle of a quarter brought an action for a wrongful dismissal, the declaration containing

mise by the servant to obey the lawful and reasonable orders of his master, within the scope of his contract, is implied by law; and a breach of this promise, in a material matter, justifies the master in discharging him. (*k*)

a special count for such dismissal. The jury were directed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except under an *indebitatus* count, and they gave damages accordingly. The plaintiff then brought a second action to recover under an *indebitatus* count for his services during the broken quarter. It was held that the action was not maintainable, because the plaintiff by his former action on the special contract had treated it as an open contract, and he could not afterwards recover under the *indebitatus* count as for services under a rescinded contract. It was also held, that in the former action the jury ought to have been directed to take the services rendered during the broken quarter into account, in awarding damages under the special count for the wrongful dismissal. And, *semble*, per *Patteson, J.*, and *Erle, J.*, that under an *indebitatus* count the servant wrongfully dismissed before the termination of the period for which he was hired cannot recover his whole wages up to such termination, as for a constructive service, but can recover only in respect of his service up to the time of his dismissal. See *Lilley v. Elwin*, 11 Q.B. 755; *Green v. Hulett*, 22 Verm. 188.

(*k*) *Per curiam*, in *The King v. St. John, Devizes*, 9 B. & C. 900. The wilful disobedience, on the part of the servant, of any lawful order of the master, is a good cause of discharge. *Spain v. Arnott*, 2 Stark. 256; *Callo v. Brouncker*, 4 C. & P. 518; *Amor v. Fearon*, 9 Ad. & El. 548. See also *Fillieul v. Armstrong*, 7 Ad. & El. 557. In the case of *Turner v. Mason*, 14 M. & W. 112, an action of *assumpsit* was brought for the wrongful dismissal of a domestic servant, without a month's notice, or payment of a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his service during the night, that he refused such leave and forbade her from so absenting herself, and that against his will she nevertheless absented herself for the night, and until the

following day, whereupon he discharged her. Replication, that when the plaintiff requested the defendant to give her leave to absent herself from his service, her mother had been seized with sudden and violent sickness, and was in imminent danger of death, and believing herself likely to die, requested the plaintiff to visit her to see her before her death, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose, she not being likely thereby to cause any injury or hindrance to his domestic affairs, and not intending to be thereby guilty of any improper omission or unreasonable delay of her duties; and because the defendant wrongfully and unjustly forbade her from so absenting herself for the purpose of visiting her mother, &c., she left his house and service, and absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, and she not causing thereby any hindrance to his domestic affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, &c. Held, on demurrer, that the plea was good, as showing a dismissal for disobedience to a lawful order of the master, and that the replication was bad, as showing no sufficient excuse for such disobedience. So where the servant assaulted his employer's servant maid, with intent to commit a rape upon her. *Atkin v. Acton*, 4 C. & P. 208. Or commits any crime, though the same be not immediately injurious to his employer. *Libhart v. Wood*, 1 W. & S. 265. So where an unmarried female servant becomes pregnant. *Rex v. Brampton, Caldecott*, 11, 14. So using abusive language to his employer. *Byrd v. Boyd*, 4 McCord, 246. Or quarrels with a fellow clerk in the store, in the presence of ladies, and draws a revolver. *Kearner v. Holmes*, 6 Louis. Ann. 373. Or is guilty of any misconduct, inconsistent with the relation of master and servant. *Singer v. McCormick*, 4 W. & S. 265. As if the servant set up a claim to be a partner with his employer.

If the contract be for a time certain, and the servant leave without cause before the time expires, it has been held in many cases, in England and in this country, that he has no claim for the services he has rendered. (*l*) Some of these

Amor v. Fearon, 9 Ad. & El. 548. Or conduct so as materially to injure his employer's business. *Lacy v. Osbaldiston*, 8 C. & K. 80. Or is guilty of repeated intoxication; *semble*, *Wise v. Wilson*, 1 C. & K. 662.

(*l*) If this question is to be governed solely by the number of authorities, it would seem to be at rest, for it is supported by the following adjudged cases: *Cutter v. Powell*, 6 T. R. 320; *Lilley v. Elwin*, 11 Q. B. 755; *Stark v. Parker*, 2 Pick. 267; *McMillan v. Vanderlip*, 12 Johns. 165; *Jennings v. Camp*, 13 Johns. 94; *Reab v. Moor*, 19 Johns. 337; *Waddington v. Oliver*, 5 B. & P. 61; *Ellis v. Hamlen*, 3 Taunt. 52; *Marsh v. Rulesson*, 1 Wendl. 514; *Faxon v. Mansfield*, 2 Mass. 147; *Lantry v. Parks*, 8 Cow. 63; *Ketchum v. Evertson*, 13 Johns. 365; *Sickels v. Pattison*, 14 Wendl. 257; *Weeks v. Leighton*, 5 New Hamp. 343; *Olmstead v. Beale*, 19 Pick. 528; *Thayer v. Wadsworth*, 19 Pick. 349; *St. Alban's Steamboat Co. v. Wilkins*, 8 Verm. 54; *Davis v. Maxwell*, 12 Met. 286; *Hunt v. Otis Man. Co.* 4 Met. 465; *Winn v. Southgate*, 17 Verm. 355; *Sutton v. Tyrell*, 12 Verm. 79; *Ripley v. Chipman*, 13 Verm. 268; *Coe v. Smith*, 1 Cart. (Ind.) 267; *Swift v. Williams*, 2 Carter, 365; *Hawkins v. Gilbert*, 19 Ala. 54. Nor does it make any difference in this respect whether the wages are estimated at a gross sum, or are to be calculated according to a certain rate per week or month, or are payable at certain stipulated times, provided the servant agree for a definite and whole term; such an arrangement being perfectly consistent with the entirety of the contract. *Davis v. Maxwell*, 12 Met. 286. The law on this point was fully affirmed in the late case of *Winn v. Southgate*, 17 Verm. 355. It was there held that if one contract to labor for another for a specified term, and leave the service of his employer before the expiration of the term, without any cause, attributable either to the employer or to the act of providence, he cannot recover any compensation for the portion of the term during

which he in fact labors. And it makes no difference that the employer, before the expiration of the term, permitted the plaintiff to be absent from his employment for a few weeks upon a journey, — the plaintiff having, after his return, again resumed labor for his employer, under the contract. Nor does it make any difference, that the plaintiff ceased laboring for his employer, under the belief that, according to the legal method of computing time, under similar contracts, he had continued laboring as long as could be required of him. Nor that the employer, during the term, has from time to time made payments to the plaintiff for his labor. But if, in such case, the defendant have made payments to the plaintiff upon the contract, during the term, and the plaintiff, having commenced an action of book account to recover for his services, is defeated, upon the ground that he left the service of the defendant, without legal cause, before the expiration of the term, the defendant can have no recovery against the plaintiff for the amount of payments thus made. See also *Rice v. The Dwight Man. Co.* 2 Cush. 80, where it is again held that if A. enter into the service of B. upon an agreement to labor for him a year, and leave at the end of six months, A. can maintain no action for the services so rendered; but if B. then promise A. to pay him for the six months' labor, upon the performance of any additional service, however slight, or the doing of some act by A., to his personal inconvenience, though of no value to B., and such service is rendered, or act done, this will so far operate as a waiver of the original contract that an action may be maintained by it for the six months' labor. That an offer to pay, by the employer, is a waiver of all forfeiture, see also *Seaver v. Morse*, 20 Verm. 620. So where the employer gives the laborer a note, before the time for which he was hired has elapsed, for the amount of wages already earned, he cannot resist payment thereof by showing that the payee left his service before the expiration of the time for which he was

cases are of great severity; as where the hiring was for a year, and after ten months and a half the servant went away, saying he would work no more for that master, and after two days returned and offered to fulfil his contract, and the master refused to receive him, it was held that the servant could recover no wages for the time he had worked. (m) The

originally hired. *Thorpe v. White*, 13 Johns. 53. See also *Hayden v. Madison*, 7 Greenl. 76. The rule before adverted to as to entire performance is not binding upon persons under the age of twenty-one years, and although they engage to work a specified time, and for a specified sum, they may nevertheless leave when they please, and recover upon a *quantum meruit* for what their services are really worth. *Moses v. Stevens*, 2 Pick. 332; *Judkins v. Walker*, 17 Maine, 38; *Bishop v. Shepherd*, 23 Pick. 492; *Vent v. Osgood*, 19 Pick. 572; *Thomas v. Dike*, 11 Verm. 273; *Medbury v. Watrous*, 7 Hill, 110; *Whitmarsh v. Hall*, 3 Denio, 375; deducting, it seems, any damage to his employer by such violation of the contract. *Thomas v. Dike*, 11 Verm. 273; *Moses v. Stevens*, 2 Pick. 332; *Judkins v. Walker*, 17 Maine, 38. But see *contrà*, *Whitmarsh v. Hall*, 3 Denio, 375, where the subject was fully considered, and *Jewett, J.*, observed upon this point:—"It is insisted on the part of the defendants that the justice erred in rejecting the evidence offered by them, on the ground that, although the plaintiff was an infant, and had a right to avoid his contract and recover the value of his services, yet that the defendants were entitled, if they had sustained an injury by such avoidance, to have a proper allowance therefor made against such value. In other words, it is claimed that the defendants are entitled, as a set-off against the value of the plaintiff's services, to such sum as is equal to the amount of the injury sustained by them, by the avoidance of the contract by the plaintiff, which in effect would charge the infant with the performance of his contract, or with damages for its violation. The proposition is not sustained by any elementary principle known to the law, and I do not find that it has been recognized by any adjudged case, unless by that of *Moses v. Stevens*, 2 Pick. 332. In that case the plaintiff, an infant, had made a spe-

cial agreement to labor for the defendant a certain time for certain wages, and before the time expired left his service voluntarily, without cause. It was held that he might recover on a *quantum meruit* for the services performed, and if his employer was injured by the sudden termination of the contract without notice, a deduction should be made on that account. The learned judge, in delivering the opinion of the court, said:—"We think the special contract being avoided, an *indebitatus assumpsit* upon a *quantum meruit* lies, as it would if no contract had been made; and no injustice will be done, because the jury will give no more than, under all circumstances, the services were worth, making any allowance for any disappointment, amounting to an injury, which the defendant in such case would sustain by the avoidance of the contract." With great respect, I am unable to yield my assent to the soundness of the qualification annexed to the proposition. I think that the infant plaintiff, in such an action, is entitled, by well settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. A recovery is allowed upon the assumption that there is no express contract at all." But in the case of *Moulton v. Trask*, 9 Met. 577, decided since *Whitmarsh v. Hall*, it was held that where a minor makes a contract, either absolute or conditional, to labor for a year, for one hundred dollars, and his employer, without sufficient cause, discharges him before the year expires, *indebitatus assumpsit* may be maintained for the minor's wages for the time during which he labored; and his employer is bound to pay at the rate of one hundred dollars a year, deducting any loss that he may have sustained from the minor's unfaithfulness, or occasional absence without leave. See also *ante*, p. 263, n. (f.).

(m) *Lantry v. Parks*, 8 Cowen, 63.

ground taken in these cases, and on which they all seem to rest, is the entirety of the contract, which is supposed to prevent any apportionment of the wages. And it has been held that the *servant cannot recover if he left because the master required of him services different from those specified in the contract, if he made no objection thereto. (n) But if prevented from performing the stipulated amount of labor by sickness, or similar inability, he may recover pay for what he has done on a *quantum meruit*. (o)

The case of *Britton v. Turner*, 6 New Hamp. R. 481, (p)

(n) *Hair v. Bell*, 6 Verm. 35; *Mullen v. Gilkinson*, 19 Verm. 503. See also *De Camp v. Stevens*, 4 Blackf. 24. In this case a person contracted to work for a year, at a certain sum per month; but after working three months and ten days, he left his employer, and sued him for the work thus done. It was proved that the defendant had manifested a disposition to get the plaintiff to leave him, and had said, after the plaintiff was gone, that he was glad of it, as the plaintiff was worth nothing. *Held*, that the action was not sustained.

(o) *Dickey v. Linscott*, 20 Maine, 453; *Fenton v. Clark*, 11 Verm. 557. In this case, *Bennett, J.*, in giving the opinion of a majority of the court, observed:—"In the case before the court, the plaintiff contracted with the defendant to labor personally for him for four months, at ten dollars per month, and by the terms of the contract, was to receive no pay till he had worked the four months. These services being of a personal character, the contract could not be performed by another, and as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of God, upon the authority of the foregoing cases, the contract was discharged. The inquiry then arises, what is the result? It appears to me apparent that the plaintiff must, at least after the expiration of the four months, be permitted to recover as upon a *quantum meruit, pro rata*, for the services rendered. Common justice requires this, and I should be sorry to find that it was not tolerated by the principles of the common law. To hold, in a case like this, where the plaintiff has been discharged of his contract by the act of God, that there can be no apportionment, upon the technical ground that

the contract is entire, and its performance a condition precedent, is, to my mind, leaving the substance and adhering to the shadow." *Redfield, J.*, dissented. See also *Seaver v. Morse*, 20 Verm. 620. In this case the plaintiff, having contracted to labor for the defendant six months, at a specified price for the term, was taken unwell, and left the defendant's service, and was so unwell, for about a month, that he was unable to perform the full labor of a man, and then he recovered his health, but did not return to the defendant's employment. It was *held* that he was entitled to recover for his services, upon a *quantum meruit*, for the time he labored. And it was also *held* that, if this were not so, an offer by the defendant, after the plaintiff had left his service, to pay the plaintiff the amount due to him, at the rate of compensation fixed by the original contract, was a waiver of all claim of forfeiture. To the same effect is *Fuller v. Brown*, 11 Met. 440, where a special agreement was made by A. and B., that A. should work for B., and that, if he should be dissatisfied, and wish to leave the service, he should give B. four weeks notice, and work for him four weeks after the notice, and then receive his pay. After A. had begun to work under this agreement, he became sick and unable to work, and left B. without giving four weeks notice, and remained sick for several weeks. *Held*, that this agreement as to notice applied to a voluntary leaving of the service by A., and not to a leaving by reason of his sickness and inability to continue therein; and that he was entitled to recover a proper compensation for the work which he had done.

(p) In this case the whole subject

resists the whole doctrine of these cases, and permits the *servant to recover on a *quantum meruit*. His right to recover is carefully guarded in this case by principles which seem to protect the master from all wrong; and to require of him only such payment as is justly due for benefits received and retained, and after all deduction for any damage he may have sustained from the breach of the contract. So guarded, it might seem that the principles of this case are better adapted to do adequate justice to both parties, and wrong to neither, than those of the numerous cases which rest upon

was fully and ably examined by *Parker, J.*, and the court came to the following conclusions, which the American Editor of Chitty on Contracts regards as "manifestly just and sensible." 1. Where a party undertakes to pay, upon a special contract for the performance of labor, he is not liable to be charged upon such special contract until the money is earned according to the terms of the agreement; and where the parties have made an express agreement, the law will not imply and raise an agreement different from that which the parties have entered into, except upon some farther transaction between them. 2. In case of a failure to perform such special contract, by default of the party contracting to do the service, if the money is not due by the terms of the special agreement, and the nature of the contract is such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled to do so, unless he has before assented to and accepted of what has been done, and in such case the party performing the labor is not entitled to recover, however much he may have done. 3. But if, upon a contract of such a character, a party actually receives useful labor, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of the excess. And the rule is the same, whether the labor was received and accepted by the assent of the party prior to the breach, and under a contract by which, from its nature, the party was to receive the labor

from time to time until the completion of the whole contract, or whether it was received and accepted by an assent subsequent to the performance of all that was in fact done. 4. In case such contract is broken, by the fault of the party employed after part performance has been received, the employer is entitled, if he so elect, to put the breach of contract in defence for the purpose of reducing the damages, or showing that nothing is due, and the benefit for which he is liable to be charged, in that case, is the amount of value which he has received, if any, beyond the amount of damage, and the implied promise which the law will raise is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the whole service, and also any damage which has been sustained by reason of the non-fulfilment of the contract. 5. If in such case it be found that the damages are equal to or greater than the amount of the value of the labor performed, so that the employer, having a right to the performance of the whole contract, has not, upon the whole case, received a beneficial service, the plaintiff cannot recover. 6. If the employer elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance of the contract. 7. If he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot therefore afterwards sustain an action for further damages.

the somewhat technical rule of the entirety of the contract. It is certain, however, that, since this case was reported, the *same question has been again considered in other courts, and decided in conformity with the earlier decisions. (q)

On the same principle of entirety of contract, it is held that if a servant is discharged for misconduct during the currency of a quarter, he is entitled to no wages from the beginning of that quarter, although he did not misbehave until the day when discharged. (r) But if the contract be dissolved by mutual consent, he may recover wages *pro rata*, without any express contract to that effect, (s) and so he may if he leave for justifiable cause. (ss) If a justifiable cause for dismissal exists, he cannot recover, although not dismissed expressly on that ground, (t) and even although the master did not know of its existence at the time. (tt) And if the servant, by his misconduct, forfeits his claim for wages, a subsequent promise of the master to pay the wages has been said to be void for want of consideration. (u)

(q) The case of *Britton v. Turner* was cited and alluded to by the court, in giving the opinion, in the subsequent case of *Olmstead v. Beale*, 19 Pick. 529, but *Morton, J.*, who there delivered the opinion of the court, said:—"We have no hesitancy in adhering to our own decisions, supported as they are by principle, and a long series of adjudications." On the other hand, the principles of *Britton v. Turner* were clearly approved by *Bennett, J.*, in delivering the opinion, in *Fenton v. Clark*, 11 Verm. 560. The Court of Vermont seems in other cases inclined to construe all entire contracts of labor and service equitably for the laborer, and to hold, where the employer has received benefit from the servant's labor, and the parties cannot be placed in *statu quo*, that the employer is liable on a *quantum meruit* for the labor actually performed, although the contract was not performed *exactly* as agreed. See *Gilman v. Hall*, 11 Verm. 510; and *Blood v. Enos*, 12 Verm. 625. See n. (o), p. 524, and also n. (l), p. 522.

(r) *Atkin v. Acton*, 4 C. & P. 208; *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171; *Turner v. Robinsons*, 6 C. & P. 15, 2 N. & M. 829. See also *Spotswood v. Barrow*, 5 Exch. 110; and *Lush v. Russell*, 5 Exch. 203.

(s) *Thomas v. Williams*, 1 Ad. & El. 685; *Hill v. Green*, 4 Pick. 114. Whether the contract has been rescinded is a question for the jury. *Lamburn v. Cruden*, 2 M. & G. 253. In this case a servant was engaged at a yearly salary, payable quarterly. A month after the termination of one of the years of the service the servant tendered his resignation. After another month the resignation was accepted, nothing being said about remuneration for the time elapsed since the termination of the last year's service. It was *held* that the law implied no engagement to pay for the services performed since the last quarter; but that, under the circumstances of this case, it ought to have been left to the jury to say whether the parties had come to an agreement that those services should be paid for.

(ss) *Patterson v. Gage*, 23 Verm. 558.

(t) *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171; *Cussons v. Skinner*, 11 M. & W. 161; *Baillie v. Kell*, 4 Bing. N. C. 638. See also *Mercer v. Whall*, 5 Q. B. 457, *Lord Denman*.

(u) *Spotswood v. Barrow*, 5 Exch. 110; *Willeys v. Green*, 3 Carr. & Kir. 59.

(u) This point was decided in the case of *Mockman v. Shepherdson*, 3 P. & D. 182. But it is to be observed that

Where the servant is wrongfully dismissed during a quarter, or other definite term, he may, after the quarter or term ends, recover for the whole, in an action, not for work and labor, but for preventing him from doing his work. (v)

It should seem from the decisions that a master is not bound to provide medical attendance or medicines for his farm servant, or his house servant, in case of illness; even if this be caused by an accident occurring while he was in the discharge of his duty. (w) But it is also held that if he does send for a physician he is not only liable himself, but cannot deduct the charge from the wages of the servant without an express agreement to that effect. (x) The master is bound

in that case there was an express agreement between the parties that, if the servant should get drunk any time during the service, he should forfeit all his wages up to that time. The case of *Seaver v. Morse*, 20 Verm. 620, is an authority for holding that a forfeiture of wages, incurred by a failure to perform an entire contract, is waived by a subsequent promise of the employer to pay such wages, although the promise is made without any new consideration. See also *ante*, p. 522, n. (l.)

(v) The earlier cases seem to have allowed a recovery in such case, on a common count for *work and labor done*. *Gandall v. Pontigny*, 4 Camp. 375; *Eardly v. Price*, 5 B. & P. 333; *Smith v. Kingsford*, 3 Scott, 279; *Collins v. Price*, 2 M. & P. 233. But the more recent authorities have established the better principle, that the balance due for work actually performed, at the time of such wrongful dismissal, may be recovered on the common counts, while there must be a special count for the amount of the month's wages, which has not been earned; or, to speak more correctly, for the recovery of damages for the wrongful dismissal, a month's wages being the measure of damages for such breach of contract. See *Archard v. Horner*, 3 C. & P. 349; *Fewings v. Tisdal*, 1 Exch. 295; *Broxham v. Wagstaffe*, 5 Jur. 845; *Smith v. Hayward*, 7 Ad. & El. 544; *Hulle v. Heightman*, 2 East, 145. See *Lilley v. Elwin*, 11 Q. B. 755. In such case the wages due at the time of dismissal cannot be recovered under such special count: there must be a count for work and

labor done; and these may be joined in the same declaration. *Hartley v. Harman*, 11 Ad. & El. 798. But see *Goodman v. Pocock*, 15 Q. B. 576. See also *ante*, p. 520, n. (j)

(w) The contrary opinion was once declared by Lord *Kenyon*, in *Scarman v. Castell*, 1 Esp. 270, but this doctrine has long since been overruled. See *Sellen v. Norman*, 4 C. & P. 80; *Cooper v. Phillips*, 4 C. & P. 581. In *Dunbar v. Williams*, 10 Johns. 249, it is said that no action lies by a physician for medicine administered to, and attendance on, a *slave*, without the knowledge or request of the master, in a case not requiring instant and immediate assistance. But, it seems, that if medical or other assistance be rendered to a slave in case of such pressing necessity as not to admit of a previous application to the master, the person rendering the assistance would be entitled to recover a compensation from the master on the *implied assumpsit*, arising from the legal obligation of the master to make the requisite provision for his slave. And in England a master is liable to provide medical attendance for his *apprentice*. *Regina v. Smith*, 8 C. & P. 153.

(x) *Sellen v. Norman*, 4 C. & P. 80; *Emmons v. Lord*, 18 Maine, 351. It would seem that he cannot deduct the servant's wages during the time he was sick and unable to work. *Story on Cont.* § 962, j, k, and cases cited. In *Nichols v. Coolahan*, 10 Met. 449, a contract was made by N. & C. that N. should have eleven dollars per month and board, so long as he should work for C., C. informing N. that he (C.)

to take proper care of his servant, and not expose him to danger, (*y*) but he is not responsible for an accident happening in the course of his service, unless the master knew that it exposed the servant to peculiar danger, and the servant did not. (*z*)

It has been held that a master who uses due care in the selection and employment of his servants, is not responsible to one of them for an injury received from the carelessness of another while employed in the master's service. (*zz*) But

might not have two days work for him. N. worked for C. several months, and brought an action for his wages, and annexed to his writ a bill of particulars, in which he charged the price agreed on per month, and gave C. credit for a certain sum on account of three weeks sickness of N., during which time he was unable to work. C. filed in set-off an account against N. for board during his sickness; it was held that the contract was a hiring by the month, that C. was not entitled to payment for N.'s board during his sickness; but that N. could not recover wages for any part of the time of his detention from work by sickness. "Another question," Hubbard, J., remarked, "might have been raised on this contract, viz., whether the plaintiff might not have been entitled to payment for his whole time; but by crediting the loss of time he has precluded that inquiry, and is properly bound by his admission." Nor, without a specific agreement to that effect, can the master deduct the value of articles injured or lost by the servant; but must bring a cross action therefor. *Le Loir v. Bristow*, 4 Camp. 134. But see *Snell v. The Independence*, Gilpin, 40; *The New Phoenix*, 2 Hagg. Adm. 420. If the servant is an infant, the master may deduct from his wages such sums as he has paid for the infant's necessities, but no other. *Hedgley v. Holt*, 4 C. & P. 104. In this case, Bayley, J., said:—"Payments made on account of wages due to an infant, for necessities, and which could not be avoided, are valid payments; but an infant cannot bind herself for things which are not necessary; indeed, even the statement of an account does not bind an infant. It appears that this young woman was under age when she settled the account. The consequences might be very inju-

rious if the law were otherwise. What would it lead to in this very case? Here is a female, who is described as rather a showy woman, suffered to dress in a manner quite unfitted for her station; and at the end of her twelve months' servitude she would not have a farthing in her pocket." In *Adams v. The Woonsocket Company*, 11 Met. 327, a father, whose minor daughter was employed by a manufacturing company, at a distance of many miles from his residence, forbade them to employ her any further, and gave them notice that if they should continue to employ her, he should demand \$3.50 per week for her time and labor, without any deduction on any account whatever, and also directed them not to pay or allow her any thing, either goods or money, on account of her labor. It was held, in an action of assumpsit by the father against the company, to recover pay for his daughter's labor, subsequently done for them, that he was entitled to recover only as much as her labor was reasonably worth, deducting the price of board provided for her by them, without any deduction for clothing which they provided for her.

(*y*) In *Priestley v. Fowler*, 3 M. & W. 1, Lord Abinger says this should be such care as the master may reasonably be expected to take of himself.

(*z*) Ibid.

(*zz*) *Farwell v. Boston & Worcester R. R. Co.* 4 Metc. 49; *Priestly v. Fowler*, 3 M. & W. 1; *Brown v. Maxwell*, 6 Hill, 594; *Hutchinson v. York, Newcastle, & Berwick Ry. Co.* 5 Exch. 343; *Wigmore v. Jay*, 5 Exch. 354; *Hubgh v. New Orleans Railroad*, 6 Louis. Ann. 495; *Coon v. Syracuse & Utica Railroad*, 1 Seld. 493; *Sherman v. Rochester & Syracuse Railroad*, 15 Barb. 574; *Albro v. Agawam Canal Co.* 6 Cush.

if the master has a general manager who employs the servants, standing in the place of the master, he is to be treated as the *agent* of the master and not as a co-servant, and if he does not hire careful servants the master is liable as if he hired improper servants himself. (za)

The master is under no legal obligation to give a testimonial of character to his servant. If he does, it will be presumed that he speaks the truth, or what he believes to be true; and therefore if he says what injures the standing and prospects of the servant, and this turn out not to be true, the master is nevertheless not liable, unless the servant can prove that the falsity was uttered in malice. (a) Such is the English rule; but it may be supposed that in this country, if the master is proved to have said what is untrue, he would be responsible for any injury arising therefrom to the servant; at least unless he could satisfy the jury that he did not speak from malice.

In order to constitute a contract of hiring and service there must be a mutual engagement, on the one part to serve, and *on the other to employ and pay. (b) But these engagements cannot always be implied one from the other, or measured one by the other. If a servant agrees to serve for a term of two years, and the master only agrees to pay so much weekly, the master is under no obligation to keep or employ him during the two years, but only to pay so much while he does employ him. (c) But where the contracts are

75; *Mitchell v. Penn. R. R. Co.*, Amer. Law Register, Oct. 1853, p. 717; *Contrd*, Little Miami Railroad Co. v. Stevens, 20 Ohio, 415; and the Scotch case of *Dixon v. Ranken*, 20 Law Times Rep. 44.

(za) *Walker v. Bolling*, 22 Ala. 294.

(a) *Rogers v. Clifton*, 3 B. & P. 591; *Edmondson v. Stephenson*, Bull. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110.

(b) See *Sykes v. Dixon*, 9 Ad. & El. 693, where B. contracted in writing to work for plaintiff in his trade, and for no other person, during twelve months, and so on from twelve months to twelve months, until B. should give notice of quitting. *Held*, that such agreement

was invalid under the statute of frauds, for want of mutuality,

(c) Thus in *Williamson v. Taylor*, 5 Q. B. 175, by an agreement between defendant and plaintiff, defendant, being the owner of a colliery, retained and hired plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and plaintiff agreed to continue defendant's servant during all times the pit should be laid off work, and, when required, (except when prevented by unavoidable cause,) to do a full day's work on every working day. *Held*, that the defendant was not obliged by this contract to employ plaintiff at reasonable times for a reasonable num-

mutual, and cover the same ground for both parties, then the master has at once a right to require the servant to enter upon the discharge of his duty during the term, and the servant has a right to require the master to employ him during the whole of the term.

Like other agreements, a contract for labor and service, if not to be performed within a year is within the Statute of Frauds, and if by parol, is wholly void. (*cc*) And if the contract of service is begun within a year from the making of it, but is not by the terms of the agreement to be completed within that time, it is within the statute and void. (*cd*) It must be certain however from the terms of the contract, or be necessarily implied therefrom, that the contract cannot be performed within a year, or it will not be void. (*ce*) This

ber of working days during the term. So in *Aspdin v. Austin*, 5 Q. B. 671, by an agreement between plaintiff and defendant, plaintiff agreed to manufacture for defendant cement of a certain quality, and defendant, on condition of plaintiff's performing such engagement, promised to pay him £4 weekly during the two years following the date of the agreement, and £5 weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and plaintiff engaged to instruct defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. Defendant afterwards covenanted by deed for the performance of the agreement on his part. *Held*, that the stipulations in the agreement did not raise an implied covenant that defendant should employ plaintiff in the business during three or two years, though defendant was bound by the express words to pay plaintiff the stipulated wages during those periods respectively, if plaintiff performed, or was ready to perform, the condition precedent on his part. See also *Dunn v. Sayles*, 5 Q. B. 685; *Pilkington v. Scott*, 15 M. & W. 657; *Elderton v. Emmens*, 6 Com. Bench, 160; *Rust v. Nottidge*, 16 E. L. & E. 170; *Regina v. Welch*, 20 E. L. & E. 82.

(*cc*) *Bracegirdle v. Heald*, 1 B. & Ald. 722. In this case the contract was by

parol on the 27th May, for a year's service from the 30th of June following, and was held void. See also *Snelling v. Lord Huntingfield*, 1 Cr. M. & R. 20; *Hinckley v. Southgate*, 11 Verm. 428; *Tuttle v. Swett*, 31 Maine, 555.

(*cd*) *Idem*; and see *Pitcher v. Wilson*, 5 Missouri, 46; *Drummond v. Burrell*, 13 Wend. 307; *Squire v. Whipple*, 1 Verm. 69; *Birch v. Earl of Liverpool*, 9 B. & Cr. 392.

(*ce*) A parol agreement to labor for a company "for the term of five years, or so long as A. shall continue to be agent of the company," is not void under the statute, as it might have been completed within a year, although in some contingencies it might extend beyond a year. *Roberts v. Rockbottom Company*, 7 Met. 47. — This construction of the statute is supported also by the cases of *Kent v. Kent*, 18 Pick. 569; *Peters v. Westborough*, 19 Pick. 364; *Wells v. Horton*, 4 Bing. 40. — In *Broadwell v. Getman*, 2 Denio, 87, it was held that a parol agreement which is not wholly to be performed within one year, is void, though some of the stipulations are to be executed within the year. And, *semble per Beardsley, J.*, it is void although one of the parties is to perform every thing on his part within the year, if a longer time than a year is stipulated for the performance by the other. But in *Cherry v. Heming*, 4 Exch. 631, it was held (affirming *Donellan v. Read*, 3 B. & Ad. 899,) that in the 4th section

subject will be however considered more fully in the second part of this work in the chapter upon the Statute of Frauds.

A nice distinction is taken in some cases between the presumptions which arise where service is rendered to a stranger, and where it is rendered to near relations. In general, wherever service is rendered and received, a contract of hiring, or an obligation to pay will be presumed. (d) But *it

of the Statute of Frauds the words, "not to be performed within the space of one year," mean, "not to be performed on either side," and that the contract in question having been performed on one side within a year from the making thereof, the case was not within the Statute. — So in *Herrin v. Butters*, 20 Maine, 119, the law on this subject is thus laid down; where by the terms of a contract the time of its performance was to be extended beyond a year, it is within the statute of frauds, though a part of it was by the agreement to be performed within a year. To bring a case within the statute of frauds, it must have been expressly stipulated by the parties, or it must, upon a reasonable construction of their contract, appear to have been understood by them, that the contract was not to be performed within a year. A. G. B. contracted in writing with S. to clear eleven acres of land in three years from the date of the contract, one acre to be seeded down the (then) present spring, one acre the next spring, and one acre the spring following; as a compensation for which, he, A. G. B., was to have all the proceeds of said land three years, except the two acres first seeded down. A. G. B. assigned verbally his interest to the extent of half the contract, to H., who verbally assigned said half to C. B.; said H. and C. B. respectively agreeing verbally to perform one half of the contract. A. G. B. and C. B. commence the performance of the contract, but do not complete it. S. sues A. G. B., and recovers damages for non-performance, which are paid by A. G. B. H. being called upon by A. G. B. for half of the damages so recovered and paid, pays the same to him; and then commences a suit for the same against C. B. — it was *held*, that the contract between them (H. and C. B.) was void by the statute of frauds, and that he was not entitled

to recover. — See also *Roberts v. Tucker*, 3 Exch. R. 632.

(d) *Phillips v. Jones*, 1 Ad. & El. 333, Lord *Denman*. See *Peacock v. Peacock*, 2 Camp. 45; *Waterman v. Gilson*, 5 Louis. Ann. 672. In *Newel v. Keith*, 11 Verm. 214, it is said that if personal services are rendered by A. to B. at the request of the latter, an action will lie for them, unless it appears from the whole evidence that they were designed to be *gratuitous*; and this is a question of fact. — So where one person has by fraud induced another to labor for a third person, the latter may still be liable for the work. *Lucas v. Godwin*, 3 Bing. N. C. 737. In *Peter v. Steel*, 3 Yeates, 250, it was *held* that assumpsit would lie in favor of a free negro, for work, labor, and service, against a person who held him in his service, claiming him as a slave. The court laid down the general principle that, where one by compulsion does work for another, whom he is under no legal or moral obligation to serve, the law will imply and raise a promise on the part of the person benefited thereby to make him a reasonable recompense. So in *Higgins v. Breen*, 9 Missouri, 497, it was *held* that where a married man represents himself to be a widower, and thus induces a woman to marry him, his wife being still alive, such woman may recover of him for her services during such time as she may live with him. — And generally where labor is performed for the benefit of another without his express request, yet if he knows of the work, and tacitly assents to it, an implied promise will arise to pay a reasonable compensation. *James v. Bixby*, 11 Mass. 34; *Farmington Academy v. Allen*, 14 Mass. 172. So where one employs the slave of another, the law implies a promise to pay the master for the services of the slave. *Cook v. Husted*, 12 Johns. 188. So of

is said not to be so where the service is rendered to the parent or uncle, or other near relative of the party, on the ground that the law regards such services as acts of gratuitous kindness and affection. We find American *authorities which recognize this distinction, and particularly where it grows out of the relation of parent and child. (e) But if a destitute person is received from charity,

an apprentice. *Bowes v. Tibbets*, 7 Greenl. 457. But labor and service voluntarily done by one for another, without his privity or consent, however meritorious or beneficial it may be to him, as in saving his property from destruction by fire, affords no ground for an action. *Bartholomew v. Jackson*, 20 Johns. 28. So if a workman be employed to do a particular job, and he choose to perform some additional work without consulting his employer, he cannot recover for such additional work. *Hort v. Norton*, 1 McCord, 22. See also *ante*, p. 391, *et seq.* Even if it is agreed between the parties that certain work shall be done gratuitously, such contract is *nudum pactum*, and the party is not bound to perform it; although it is said that if he once enter upon the performance of such contract, he is bound to complete it. See *Rutgers v. Lucet*, 2 Johns. Cas. 92, (2d ed.) and note.

(e) In *Andrus v. Foster*, 17 Verm. 556, it was held that where a daughter continues to reside in the family of her father after the age of majority, the same as before, the law implies no obligation on the part of her father to pay for her services. And the same rule applies to cases where the person from whom the compensation for services is claimed took the plaintiff into his family, when she was a child, to live with him till she should become of age, and she continues, after that time, to reside in his family, he standing *in loco parentis* to her. If she claim pay, it is incumbent on her to show that the services were performed under such circumstances as to justify an expectation on the part of both that pecuniary compensation would be required. The right to compensation for services in such cases must depend upon the circumstances of each particular case. See also *Fitch v. Peckham*, 16 Verm. 150; *Weir v. Weir*, 3 B. Monroe, 647; *Al-*

fred v. Fitzjames, 3 Esp. 3. In *Guild v. Guild*, 15 Pick. 130, the law on this point is thus summed up by *Shaw, C. J.*:—"The point is, whether, where a daughter, after arriving at twenty-one years of age, being unmarried, continues to reside in her father's family, performing such useful services as it is customary for a daughter to perform, and receiving such protection, subsistence, and supplies of necessities and comforts, as it is usual for a daughter to receive in a father's family, the law raises any presumption that she is entitled to a pecuniary compensation for such services, and whether, after proving these facts, the burden of proof is on the defendant, to show that the services were performed without any view to pecuniary compensation. Some of the court are of opinion that as it is the ordinary presumption, between strangers, that upon the performance of useful and valuable services in the family of another, it is upon an implied promise to pay as much as such services are reasonably worth, so, after the legal period of emancipation, the law raises a similar implied promise from a father to a daughter. Other members of the court are of opinion, (confining the opinion to the case of daughters, and expressing no opinion as to the case of sons, laboring on the farm or otherwise in the service of a father,) that the prolonged residence of a daughter in her father's family after twenty-one, performing her share in the ordinary labors of the family, and receiving the protection and supplies contemplated in the supposed case, may well be accounted for, upon considerations of mutual kindness and good will, and mutual comfort and convenience, without presuming that there was any understanding, or any expectation that pecuniary compensation was to be made; that proof of these facts alone, therefore, does not raise an im-

provided with necessaries and set to work, he is under no obligation to remain, nor has he any claim for wages, unless there be some express agreement, or one may be implied from the peculiar circumstances of the case.

A person who seduces a servant away from the service of his master or employer is liable in an action for damages. Although this principle has been less positively settled by *adjudication in this country than in England, we have no doubt of it, as a rule of law. (f)

plied promise to make any pecuniary compensation for such services, or throw on the defendant the burden of proof to show, affirmatively, that the daughter performed the services gratuitously, and without any expectation of receiving wages or pecuniary compensation, but with a view to the share she might hope to receive in her father's estate or otherwise." The court were equally divided on this question, and did not decide it; but they were unanimous in the opinion that in all such cases the question must be determined by the jury, on all the circumstances, whether there was an implied request for labor, and an implied promise of repayment or not. In *King v. Sow*, 1 B. & Ald. 179, a female natural child was hired for a year by the wife of its reputed father, and continued doing the household work for three years, but after the first year no wages were paid, nor was there any new contract of hiring. *Held*, that the sessions were warranted in finding that after that time she did not continue on the terms of the original contract. And *Bayley, J.*, said:—"Where the parties are not related, it may fairly be presumed from a continuance in the service that the terms on which they continue are the same as during the preceding year. But where the relation of father and child subsists, the ground for that presumption fails." See to the same effect *Dye v. Kerr*, 15 Barb. 444; *Ridgway v. English*, 2 N. Jersey, 409; *Swires v. Parsons*, 5 W. & Serg. 357; *Defrance v. Austin*, 9 Penn. 309; *Steel v. Steel*, 12 Penn. 64; *Lantz v. Frey*, 14 Penn. 201; *Zerbe v. Miller*, 16 Penn. 488; *Resor v. Johnson*, 1 Cart. (Ind.) 100; *Hussey v. Roundtree*, 1 Busbee's

Law R. 110; *Partlow v. Cooke*, 2 R. I. 451.—So an action cannot be maintained for services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt. See *Osborn v. Governors of Guy's Hospital*, Strange, 728; *Le Sage v. Coussmaker*, 1 Esp. 188; *Little v. Dawson*, 4 Dall. 111; *Lee v. Lee*, 6 Gill & Johns. 309. Nor will an action for work and labor lie for services performed under a contract of apprenticeship which before the expiration of the service turns out to be void. *Maltby v. Harwood*, 12 Barb. 473. But where one party has rendered services for another, and it is manifest from the circumstances of the case that it was understood by both parties that compensation should be made by will, *and none is made*, an action will lie to recover the value of such services. *Martin v. Wright*, 13 Wend. 460. In *Eaton v. Benton*, 2 Hill, 576, it is said that one who has served another, in expectation of a testamentary provision, and to whom the latter subsequently devises a portion of his estate, cannot maintain a suit for such services against the executors. The general rule seems to be, that a legacy left by a debtor to his creditor, which in amount is equal to or greater than the debt, shall be presumed to be in satisfaction of it.

(f) *Lumley v. Gye*, 20 E. L. & E. 168; *Keane v. Boycott*, 2 H. Bl. 511; *Hart v. Aldridge*, Cowp. 54. See also *Peters v. Lord*, 18 Conn. 337; *Haight v. Badgeley*, 15 Barb. 499. This doctrine was held at *nisi prius*, by *Morton, J.*, in an interesting case in Massachusetts, a few years since. So one is liable for continuing to employ the servant of another, after notice, although

In some cases very liberal presumption of payment is made in favor of the master; as where the servant has left his master for a considerable period; and where it is usual to pay wages weekly. (g)

SECTION II.

APPRENTICES.

The English law of apprenticeship grew out of, and with nearly all its incidents rested upon, the ancient establishment of guilds, or companies for trade or for handicraft, which were once almost universal throughout Europe, and still generally subsist, although much modified in form and effect. No one could pursue a trade or mechanical occupation, on his own account, who was not a member of such guild or company. Nor could he become a member except by a regular apprenticeship. Hence, a change of trade became very difficult; and the several companies provided with great care against such increase of their numbers as should render it too difficult for all to find occupation. Under such circumstances, to enter upon an apprenticeship which led to such membership was to acquire a support for life, and it was usual to pay large fees to the master. This custom exists in England now very generally. In this country we sup-

the defendant did not himself procure the servant to leave his former master, or know when he employed him, that he was the servant of another. *Blake v. Lanyon*, 6 T. R. 221. Although a servant is hired by the piece, and not for any certain time, yet an action lies for enticing him away. *Anon. Loft*, 493. But an action will not lie for inducing a servant to leave his master's employ at the expiration of the time for which he originally hired himself, although the servant had not at the time any intention of then quitting his master. *Nichols v. Martyn*, 2 Esp. 734. The contract of hiring between the servant and his former master must have been binding, in order to render

one enticing him away liable therefor. *Sykes v. Dixon*, 9 Ad. & El. 693. The damages in this action are not such as the master sustained *at the time*, but such as he would naturally sustain from the leaving of his employment. *Gunter v. Astor*, 4 Moore, 12; *Dixon v. Bell*, 1 Stark. 287. See *Hays v. Borders*, 1 Gilman, 46; *McKay v. Bryson*, 5 Ired. 216.

(g) See *Sellen v. Norman*, 4 C. & P. 81; *Lucas v. Novosilieski*, 1 Esp. 296; *Evans v. Birch*, 3 Camp. 10. But it is no evidence of payment for one servant's labor that other laborers employed by the party, on the same work, at the same time, were duly paid. *Filer v. Peebles*, 8 New Hamp. 226.

pose it to occur much less frequently; and the entire freedom of employment, and the absolute right which every person has to engage in what business he pleases, and to change his business as often as he pleases, has undoubtedly operated to make apprenticeships less common with us than in Europe. In some parts of our country they are comparatively infrequent; and perhaps in none are they so necessary or so universal an introduction to business as they still are in England.

The contract of apprenticeship is generally in writing, and most frequently by deed, and is to be construed and enforced as to all the parties, by the common principles of the law of contracts. Usually, the apprentice, who is himself a minor, and his father or guardian with him, covenant that he shall serve his master faithfully during the term. And the master covenants that he will teach the apprentice his trade, and supply him with all necessaries, and at the end of the term give him money or clothes. And in case of sickness he is bound to provide proper medicines and attendance. (*h*) At common law the infant is not himself responsible, being a minor; (*i*) and therefore an adult also covenants with him; and at the age of majority the infant may repudiate the contract if it extends beyond that period.

The sickness of the apprentice, or his inability to learn or to serve, without his fault, does not discharge the master

(*h*) *Regina v. Smith*, 8 C. & P. 153.

(*i*) *Cuming v. Hill*, 3 B. & Ald. 59.

At common law, an indenture of apprenticeship was not binding upon an infant. See *Gylbert v. Fletcher*, Cro. Car. 179; *Jennings v. Pitman*, Hutton, 63; *Lylly's case*, 7 Mod. 15; *McDowle's case*, 8 Johns. 331; *Whitley v. Loftus*, 8 Mod. 191. In *Woodruff v. Logan*, 1 Eng. [Ark.] 276, it was said that a contract of apprenticeship was binding upon an infant, as being for his benefit; but this is not consistent with the current of authority, or the analogy of the law. — But the father might be bound on the covenants; and it would be no defence to an action by the master against the father, for the desertion of the infant, that the infant was not bound by the

indenture; for if the son does not choose to do that which the father covenanted he should do, the covenant is broken, and the father is liable. *Cuming v. Hill*, 3 B. & Ald. 57. In *Hiatt v. Gilmer*, 6 Ired. 450, where a boy was bound by his father as an apprentice to a copartnership, to be taught a mechanical trade, and the father took away the boy before his time was expired, and soon afterwards the partnership was dissolved, the period of apprenticeship being still unexpired, it was held by a majority of the court, *Ruffin, C. J., dissenting*, that the persons composing the partnership could only recover damages for the loss of the boy's services during the time the copartnership continued, and not afterwards.

from his covenants, (*j*) because these covenants are independent, and he takes this liability on himself. Nor will such misconduct as would authorize a master to discharge a common servant discharge the master of an apprentice from his liability on his contract. (*k*) But if the apprentice deserts from his service, and contracts a new relation which disables him from returning lawfully to his master, the latter is not bound to receive him again if he offers to return. (*l*)

The parties who covenant for the good behavior and continued service of the apprentice are not liable for trifling misconduct; but it seems by the English cases that, for whatever produces substantial injury to the master, as long continued absence, repudiation at majority, or the like, they are liable. (*m*) But it seems not to be so in this country, under

(*j*) *Rex v. De Hales Owen*, 1 Str. 99.

(*k*) *Winstone v. Linn*, 1 B. & C. 460. So in *Wise v. Wilson*, 1 C. & K. 662, it was *held* that a person has a right to dismiss a *servant* for misconduct, but has no right to turn away an apprentice because he misbehaves; but the case of a young man, seventeen years old, who, under a written agreement not under seal, is placed with a surgeon as "*pupil and assistant*" and with whom a premium is paid, is a case between that of apprenticeship and service; and if such a person on some occasions come home intoxicated, this *alone* will not justify the surgeon in dismissing him. But if the "*pupil and assistant*," by employing the shopboy to compound the medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him. And Lord *Denman*, C. J., in summing up, said:—"There is a great distinction between a contract of apprenticeship, and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves."

(*l*) *Hughes v. Humphreys*, 6 B. & C. 680, which was covenant by the father of an apprentice against the master, for not teaching and providing for the apprentice. Plea, that up to a certain time defendant did teach, &c., and that then the apprentice, without leave, quit-

ted the defendant's service, and never returned. Replication, that on, &c., defendant refused then, or ever, to receive back the apprentice, and thereby discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, and that plaintiff never requested defendant to receive back the apprentice, when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, defendant refused then, or ever, to take him back, and wholly discharged him from his service. *Held*, on demurrer, that the surrejoinder was bad, not being a sufficient answer to the rejoinder, and that the plea was good, as it disclosed a sufficient excuse for non-performance of the defendant's covenant.

(*m*) *Wright v. Gihon*, 3 C. & P. 583, where it was *held* that the staying out by an apprentice on a Sunday evening beyond the time allowed him, is not such an unlawful absentsing of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. In *Cuming v. Hill*, 3 B. & Ald. 59, the action was covenant upon an indenture of apprenticeship, by the master against the father; the breach assigned was that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, and that he then avoided the indenture. *Held*, that this was no answer to the action. *Abbott*, C. J.,

our common statutory apprenticeships, (*n*) although doubtless phraseology might be adopted which would have that effect. Where the indenture can be construed as meaning only that the parent or guardian sanctions the binding of the apprentice, and does not bind himself, it will be so construed, although the covenants may seem to be covenants both of the apprentice and of the parent.

Not only a party who seduces an apprentice from his service is liable, (*o*) but where one employs an apprentice without the knowledge and consent of his master, the employer is liable to the master for the services of the apprentice, although he did not know the fact of the apprenticeship. (*oo*)

said:—"I am of opinion that the father is liable to this action. He covenants that the son shall faithfully serve; the avoidance of the apprenticeship by the son during the term cannot discharge the father's covenant. The indenture of apprenticeship has existed in this form for more than a century, and has been in universal use. A construction has been put upon the instrument in a court of law, in the case cited from *Douglas* (Branch v. Ewington, Doug. 518.) I do not see any reason to doubt the propriety of that decision, and I think, therefore, upon principle as well as upon authority, that the defendant is answerable in this action." *Bayley, J.*, also said:—"I may bind myself that A. B. shall do an act, although it is in his option whether he will do it or not. The father here binds himself that the son shall serve seven years. It is no answer in an action brought against the father, for the breach of that covenant, for him to say that it was in the option of the son whether he would serve or not. If the son does not choose to do that which the father covenanted he should do, the covenant is then broken, and the father is liable."—It seems that any change of trade on the part of the master discharges the father from his obligation that the son shall continue to serve. *Ellen v. Topp*, 4 E. L. & E. 412.

(*n*) *Blunt v. Melcher*, 2 Mass. 228, where it was held that in an indenture of apprenticeship made by the master, the apprentice, and the guardian of the apprentice, the covenants that "the apprentice shall faithfully serve his master," &c., are not the covenants of the

guardian. And *Parker, J.*, in giving his opinion, observed:—"The question for our determination is, whether the defendant is bound by the covenants in this indenture for the apprentice's good conduct. My opinion is decidedly that he is not bound. He is not mentioned as a party to those or any other covenants contained in the instrument. The intent of all the parties in making this indenture appears from the instrument itself. The apprentice binds himself with the consent of his guardian. To express that consent, and, in my opinion, with no other intent, and for no other purpose, the guardian signs and seals the instrument. It is objected to this that great inconveniences and mischiefs will arise from this construction of this species of indenture. But to guard against these, the guardian may enter into covenants explicitly with the master, and there is no doubt such covenants will be valid and binding upon him." See also *Holbrook v. Bullard*, 10 Pick. 68. The same rule is supported by *Ackley v. Hoskins*, 14 Johns. 374. See further *Sackett v. Johnson*, 3 Blackf. 61; *Chapman v. Crane*, 20 Maine, 172.

(*o*) *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191. So, it seems, that the seduction of a minor, who is a servant *de facto*, though not a legal apprentice, from the service of the master, is actionable. *Peters v. Lord*, 18 Conn. 337.

(*oo*) *Bowes v. Tibbets*, 7 Greenl. 457; *Conant v. Raymond*, 2 Aik. 243; *Munsey v. Goodwin*, 3 New Hamp. 272; *James v. Le Roy*, 6 Johns. 274. In *Ayer v. Chase*, 19 Pick. 556, where the

* It may be added that if an action be brought for harboring an apprentice against the will or without the consent of his master, the plaintiff is bound to prove that the defendant had a knowledge of the apprenticeship. (*p*) But a defendant who did not know the apprenticeship when he hired or received the apprentice, and who being informed thereof continued to retain and harbor him, thereby makes himself liable. (*pp*)

plaintiff put his apprentice into the service of another person exercising the plaintiff's trade, for a short time, on wages to be paid to the plaintiff, and during that period the apprentice absconded and went to sea, it was *held* that by such transfer of the apprentice the plaintiff's right to his services was suspended, and that it did not re-

vive upon his absconding, so as to entitle the plaintiff to his earnings on the voyage.

(*p*) *Ferguson v. Tucker*, 2 Harr. & Gill. 182. And see *Stuart v. Simpson*, 1 Wend. 376; *Conant v. Raymond*, 2 Aikens, 243.

(*pp*) *Ferguson v. Tucker*, *supra*.

CHAPTER X.

CONTRACTS FOR SERVICE GENERALLY.

THERE is in all such contracts a promise, implied if not expressed, that the party employing will pay for the service rendered; (*q*) and, on the other hand, that the party employed will use due care and diligence, and have and exercise the skill and knowledge requisite for the employment undertaken. (*r*) And if the contract express that the service shall be gratuitous, then it is void for want of consideration; (*s*) but there may be a valid agreement to delay payment, or to make the payment conditional on the happening of some event, — as when the work is finished, or when the employer receives his pay. (*t*) If a party agrees to do work, and receive no pay, he cannot recover pay, (*u*) if he does the work;

(*q*) *Phillips v. Jones*, 1 Ad. & El. 333, *ante*, page 529, (*d*.)

(*r*) *Morris v. Redfield*, 23 Verm. 295; *Goslin v. Hodson*, 24 Verm. 140; *Hall v. Cannon*, 4 Harring. 360; *Hager v. Nolan*, 6 Louis. Ann. 70. And see *Streeter v. Horlock*, 1 Bing. 34.

(*s*) In such case the person contracting to do the work is not bound to commence it. But if, in the understanding of all parties, the services were originally rendered gratuitously, they cannot afterwards be made a charge. *James v. O'Driscoll*, 2 Bay. 101. So in *Davies v. Davies*, 9 C. & P. 87, A. and his wife boarded and lodged in the house of B., the brother of A., and both A. and his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set off for board and lodging. *Held*, that neither the services on the one hand, nor the board and lodging on the other, could be charged for, unless the

jury were satisfied that the parties came together on the terms that they were to pay and to be paid; but that if that were not so, no *ex post facto* charge could be made on either side.

(*t*) *Robinson v. The New York Ins. Co.* 2 Caines, 357, 1 Johns. 616.

(*u*) In *Jacobson v. Le Grange*, 3 Johns. 199, where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child; and he lived and worked for him above eleven years, and the uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising any thing to the nephew, or making him any compensation; it was *held* that an action on an implied assumpsit would lie against the executors, for the work and labor performed by the nephew for the testator. But in *Patterson v. Pat-*

but if there be a contract of service which is silent or indefinite in regard to compensation, the party who renders the service under it may recover pay under a *quantum meruit*; (v) and if by the contract the party employed agrees to leave the compensation *entirely* to the employer, the jury may give what the employer ought to give. (w)

It seems to be doubted in England whether an arbitrator can recover for his services without an express promise; (x) but the doubt appears to grow out of the peculiar English rule, that the employment of a barrister at law is wholly honorary, and gives him no legal claim for compensation. We have no such recognized rule here, although the distinction between barristers and attorneys is preserved in some States, and it seems that some difference has been made as

terson, 13 Johns. 379, the facts were that the plaintiff, after he had come of age, lived with and worked for his father, the defendant, who said he would reward him well, and provide for him in his will; *held*, that the plaintiff could not maintain an action to recover compensation for his services during the lifetime of his father. See also *ante*, p. 531, n. (e.)

(v) See *Jewry v. Busk*, 5 Taunt. 302; *Bryant v. Flight*, 5 M. & W. 116.

(w) Thus, in *Bryant v. Flight*, 5 M. & W. 114, A. agreed to enter into the service of B., and wrote to him a letter, as follows:—"I hereby agree to enter your service as weekly manager, commencing next Monday; and the amount of payment I am to receive I leave entirely to you." A. served B. in that capacity for six weeks. *Held*, (*Parke, B., dissentiente*,) that the contract implied that A. was to be paid something at all events for the services he performed; and that the jury, in an action on a *quantum meruit*, might ascertain what B., acting *bonâ fide*, would or ought to have awarded. So in *Jewry v. Busk*, 5 Taunt. 302, it is *held* that a request to a tradesman to show the defendant's house, "and the defendant would make him a handsome present," is evidence of a contract to pay a reasonable compensation for the work and labor bestowed in that service. But in the earlier case of *Taylor v. Brewer*, 1 M. & S. 290, where a person performed work for a committee, under a resolu-

tion entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was *held* that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due.

(x) Although the English cases are not quite agreed upon the subject, yet it seems the more generally received opinion in that country, that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services. *Virany v. Warne*, 4 Esp. 447; *Burroughes v. Clarke*, 1 Dowl. P. C. 48. But see *Swinford v. Burn*, 1 Gow, 5. An express promise to pay by the party will, however, bind him, and give the arbitrator a right of action. *Hoggins v. Gordon*, 3 Q. B. 466. In this country, arbitrators and referees under a rule of court have the same right to recover for their services as any person for his labor. *Hinman v. Hapgood*, 1 Denio, 188; *Hassinger v. Diver*, 2 Miles, 411. But the action must not be against both parties to the suit *jointly*, but only against the party producing the claim or demand. *Butman v. Abbot*, 2 Greenl. 361. If there were several arbitrators, each may maintain a separate action for his own services. *Hinman v. Hapgood*, 1 Denio, 188. *Butman v. Abbot*, *supra*.

to their lien on the papers or the judgment for fees. (*y*) In general, however, all lawyers have in this country the same legal claim for compensation that attorneys have in England. (*z*) So in England a *physician* (or one licensed by the college of physicians,) has no remedy at law for his services; (*a*) but a "medical practitioner," whose legal appellation is usually "apothecary," has; but we have no such distinction here. (*b*)

(*y*) In most States there is no difference between attorneys, counsellors, and barristers in this respect. See *Heartt v. Chipman*, 2 Aikens, 162; 2 Greenl. Ev. § 144, n. 4; *Mooney v. Lloyd*, 5 S. & R. 412; *Gray v. Brackenridge*, 2 Penn. 75. Although an attorney has a lien on a judgment for his fees and expenses, yet this does not include fees as a "counsellor." *Heartt v. Chipman*, *supra*.

(*z*) *Wilson v. Burr*, 25 Wend. 386; *Stevens v. Adams*, 23 Wend. 57; *Newman v. Washington*, Mart. & Yer. 79. But see *Van Atta v. McKinney*, 1 Harr. 235. The law implies a promise on the part of the client to pay his attorney for his services the statute rate of compensation. The burden of proving that the attorney undertook to perform the services for a less rate is upon the client. *Brady v. Mayor, &c.* 1 Sandf. 569. But the attorney cannot recover more than he agreed to receive, by proof that his services were worth more. *Coopwood v. Wallace*, 12 Ala. 790. Nor can he rightfully claim one half of the amount recovered, because the debt was desperate. *Christy v. Douglas, Wright*, 485. Although the attorney, during the pendency of a suit, makes a contract with his client, which is void for champerty, he may still recover for such services as were rendered before such illegal agreement was entered into. *Thurston v. Percival*, 1 Pick. 415. See *Rust v. Larue*, 4 Litt. 417; *Caldwell v. Shepherd*, 6 Monr. 392; *Smith v. Thompson*, 7 B. Monr. 305. But in an action by an attorney for services, his pocket-docket, on which is entered the names of cases in which he acted as counsel, is not of itself evidence of his right to charge for his services. *Briggs v. Georgia*, 15 Verm. 61. An attorney cannot recover of his client for professional services without proving a retainer, and proof of the actual per-

formance of services is not sufficient, where there is no proof of a knowledge or a recognition of the services by the client. *Burghart v. Gardner*, 3 Barb. 64. An attorney has, in some States, a lien upon his client's papers left with him, for any general balance due him. *Dennett v. Cutts*, 11 New Hamp. 163; *Walker v. Sargeant*, 14 Verm. 247; *Aliter* in Pennsylvania. *Walton v. Dickerson*, 7 Barr. 376. So by statute in many States he has a lien upon a judgment actually recovered in favor of his client, for his fees and disbursements. *Dunklee v. Locke*, 13 Mass. 525; *Potter v. Mayo*, 3 Greenl. 34; *Gammon v. Chandler*, 30 Maine, 152; *Ocean Ins. Co. v. Rider*, 22 Pick. 210. And even without statute provisions. *Sexton v. Pike*, 8 Eng. (Ark.) 193. A counsel, who, with his client's consent, withdraws from a case after having tendered beneficial services, does not thereby lose his right to compensation for the services rendered, unless at the time of his withdrawal he waives or abandons his claim to compensation. *Coopwood v. Wallace*, 12 Ala. 790.

(*a*) *Chorley v. Bolcot*, 4 T. R. 317; *Lipscombe v. Holmes*, 2 Camp. 441; *Poucher v. Norman*, 3 B. & C. 745. Neither could a physician who prepared or dispensed his own medicines recover for them, although they were furnished to his own patients. *Best, J.*, in *Allison v. Haydon*. 1 M. & P. 591, 4 Bing. 619.

(*b*) In some States physicians may recover for their services, although they were never licensed as physicians. See *Towle v. Marrett*, 3 Greenl. 22; *Hewitt v. Wilcox*, 1 Met. 154; *Bailey v. Mogg*, 4 Den. 60; *Warren v. Saxby*, 12 Verm. 146. In other States there either now exist, or have existed, statutes, providing that they shall not be entitled to the benefit of the law to recover their fees, unless they have been duly licensed by some

Where there is a special agreement for the performance of work, no action can be maintained on a *quantum meruit* while the contract remains open and executory. (c)

It often happens, where there is a contract for a piece of work to be done for a definite sum, as for a house to be built or repaired, that extra work is done by the party employed; and there are numerous and conflicting cases as to the rights and obligations of the parties in these cases. It seems to have been at one time doubted whether any claim existed for such extra work, unless a new contract could be shown; and such is the provision of the French law. (d) But from the authorities generally, and the reason of the case, we think the following principles may be deduced.

medical society, or graduated a doctor in some medical school. See *Hewitt v. Charier*, 16 Pick. 353; *Spaulding v. Alford*, 1 Pick. 33; *Smith v. Tracy*, 2 Hall, 465; *Berry v. Scott*, 2 Harr. & Gill, 92. In some States it has been held, that although such restrictive statutes have been repealed, a physician cannot recover for services performed before such repeal. *Warren v. Saxby*, 12 Verm. 146; *Nichols v. Poulson*, 6 Ohio, 305; *Bailey v. Mogg*, 4 Denio, 60; *contra*, *Hewitt v. Wilcox*, 1 Met. 154. A physician undertakes to employ usual skill, but not to cure. *Gallaher v. Thompson*, *Wright*, 466. He may, however, make a conditional contract, that if he does not cure he shall not be paid; such a contract is valid; and in such case he cannot recover for his services or his medicines, unless he shows a performance of the condition on his part. *Smith v. Hyde*, 19 Verm. 54. It is not necessary, however, in order to constitute such a conditional contract, that a specific price should be agreed upon. In case of a cure he will be entitled to a reasonable compensation. *Mock v. Kelly*, 3 Ala. 387.

(c) *Clark v. Smith*, 14 Johns. 326; *Rees v. Lines*, 8 C. & P. 126; which was an action of assumpsit. The first count of the declaration was on a special agreement for the plaintiff to build a house for the defendant, at an agreed price, and stated that the plaintiff had bestowed work upon the house, and that the defendant abandoned the contract, and hindered the plaintiff from completing it; 2d count, for goods sold.

Pleas, non-assumpsit, and that the defendant did not abandon the contract, or prevent the plaintiff from completing the house. The particulars of demand were for work and materials under the agreement. *Held*, that if the defendant had not hindered the plaintiff from completing the house, the plaintiff could not recover any thing, except for extra work, which was not in the contract, and that the fact that the defendant, when asked for money, had said that he would never pay a farthing, was not proof that the contract had been abandoned, as the defendant was not then liable to pay any thing, the work not being completed.—So where A. engaged to convey away certain rubbish for B. at a specified sum, under a fraudulent representation by B. as to the quantity of rubbish which was to be so conveyed. *Held*, that in an action for the work actually done, A. could recover only according to the terms of the special contract, although when he discovered the fraud he might have repudiated the contract, and sued B. for deceit. *Selway v. Fogg*, 5 M. & W. 83. If the whole of such special contract is executed on the plaintiff's part, and the time of payment has elapsed, general assumpsit may be maintained; and the measure of damages will be the rate of compensation fixed by the special contract. *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Perkins v. Hart*, 11 Wheat. 237; *Chesapeake and Ohio Canal v. Knapp*, 9 Peters, 541; *Baker v. Corey*, 19 Pick. 496.

(d) Code Civile, bk. 3, tit. 8, art. 1793.

The party cannot recover for extra work, or even for better materials used, if he had not the authority of the other party therefor. (e) But the authority will be implied if the employing party saw or knew of the work or materials in time to object and stop the work, without injury to himself, and not under circumstances to justify his belief that no charge was intended, and did not object, but received and held the benefit of the same. (f) And if he received from the employed an estimate of the cost of such *extra* work, and then ordered it, the party employed might be bound by that estimate. And if the changes were such that the employer need not infer that they involved any additional expense, and he was not so informed, an express assent to them does not imply a promise to pay for them, because it is fair to suppose that

(e) *Hort v. Norton*, 1 McCord, 22; *Wilmot v. Smith*, 3 C. & P. 453, where it was ruled by Lord *Tenterden* that if A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials. For labor and service voluntarily done by one for another, without his privity or consent, however meritorious or beneficial it may be to him, as in saving his property from destruction by fire, itself affords no ground for an action. *Bartholomew v. Jackson*, 20 Johns. 28. Neither can a tenant recover of his landlord for repairs upon the demised premises, unless there was a special agreement by the latter to pay for them. *Mumford v. Brown*, 6 Cowen, 475.

(f) In *Lovelock v. King*, 1 M. & Rob. 60, a very important and wholesome principle was laid down upon the subject of *extra* work, where there is a specific contract for certain work at a fixed price. The action was assumpsit on a carpenter's bill for alterations in a house of the defendant. Lord *Tenterden*, in summing up to the jury, observed:—"That the case, although very common in its circumstances, involved a very important principle, and required their very serious considera-

tion. In this case, as in most others of the kind, the work was originally undertaken on a contract for a fixed sum. A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labor and expenditure; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering that a party does not abandon the security of his contracts by consenting that such alterations shall be made, unless he is also informed, at the time of the consent, that the effect of the alteration will be to increase the expense of the work."

he believed they were done under the contract, and assented to only on those terms. If the changes necessarily imply an increased price, and he expressly authorizes, or silently, but with full knowledge, assents to them, he is then bound to pay for them. The question may then arise, whether he is to pay for them according to the usual rate of charging for such work, with no reference to the contract, or whether he must pay only according to the rate of the contract. Some cases hold the former; but we think the better practice and the better reason in favor of the latter. (*g*)

(*g*) In *McCormick v. Connolly*, 2 Bay, 401, it was said that where a contract is made for any building, of whatever size or dimensions, it becomes a law to both parties, and they are both bound by it and whatever additions or alterations are made in such building, they form a new contract, either express or implied, and must be paid for agreeably to such new contract. See *Wright v. Wright*, 1 Litt. 179. In *Dubois v. Del. & Hud. Canal Co.* 12 Wend. 334, a party entered into an agreement for the construction of a section of a canal, by which he was to receive a given price per cubic yard for ordinary excavation, and an increased sum per cubic yard for excavation of rock, but no compensation was provided for the excavation of hard pan. During the progress of the work a large quantity of the latter substance was excavated, a fair remuneration for which exceeded the highest price specified in the contract for any species of work, and the parties whilst the section was constructing, treated the excavation of hard pan as not embraced in the contract, and after its completion it was conceded by him for whom the work was done that the contractor was entitled to compensation for such work, beyond the price fixed for ordinary excavation; it was *held* that the con-

tractor was entitled to recover for such work upon a *quantum meruit* whatever he could show the work was worth. In *Tebbetts v. Haskins*, 16 Maine, 288, where a contract in writing had been made between two persons, wherein one agreed to build a house, and the other to pay a certain sum therefor, and which had afterwards been abandoned by them, and a house had been built by one party to the written contract for the other party and two others; it was *held* that it was not necessary to prove an express contract, but that one might be implied; and that the price for building the house was not to be ascertained from that fixed in the written contract. In *De Boom v. Priestly*, 1 Cala. 206, which was an action on a *quantum meruit*, the court *held* that where there has been a special contract which is afterwards deviated from, the party cannot sue thereon, but must bring his action on an implied contract, and at the trial the damages must be graduated according to the terms of the original contract, so far as the work can be traced under it. And in *Farmer v. Francis*, 12 Ired. L. 282, it is *held* that a party working after the time limited for the performance of a contract is confined in his action to the rate of compensation fixed by the contract. The same doctrine is *held* in *Jones v. Woodbury*, 11 B. Mon. 167.

CHAPTER XI.

MARRIAGE.

WE have now to consider, first, contracts to marry; then contracts in relation to a future marriage; then contracts in restraint of marriage; and, lastly, the contract of marriage.

SECTION I.

CONTRACTS TO MARRY.

Contracts to marry at a future time were once regarded by the English courts with disfavor. They "should be looked upon," said Lord Hardwicke, "with a jealous eye;" and Lord Mansfield quoted this remark with approbation. (*h*) But it is now perfectly well settled, both in England and in this country, and indeed has been for a considerable time, that these contracts are as valid and effectual in law as any; and that, in actions upon them, damages may be recovered, not only for pecuniary loss, but for suffering, and injury to condition and prospects. (*i*) The reason is obvious; marriages can seldom be celebrated simultaneously with betrothment, or engagement; a certain time must intervene; and it would be very unjust to leave parties who suffer by a breach of a contract of such extreme importance wholly remediless.

(*h*) *Holcroft v. Dickenson*, Carter, 233; *Key v. Bradshaw*, 2 Vern. 102; *Woodhouse v. Shepley*, 2 Atkyns, 539; *Lowe v. Peers*, 4 Bur. 2230. In this last case Lord Mansfield says:—"All these contracts should be looked upon (as Lord Hardwicke said in *Woodhouse v. Shepley*,) with a *jealous eye*; even supposing them clear of any direct fraud."

This particular phrase is not found in Lord Hardwicke's decision as reported, but the opinion may be gathered from what he says.

(*i*) *Boynton v. Kellogg*, 3 Mass. 189; *Paul v. Frazier*, 3 Mass. 71; *Wightman v. Coates*, 15 Mass. 1; *Morgan v. Yarborough*, 5 Louis. Ann. 317.

The promises must be reciprocal; (*j*) but they need not be made at the same time; for if an offer be made, though retractable until acceptance, yet if not retracted it remains for reasonable time open for acceptance, and when accepted the contract is complete.

An apparent exception as to this necessity of reciprocity is taken where the promise to marry is made by deed. There, as the seal implies consideration, no other is strictly necessary; but the covenantee must be ready, able, and willing to receive the covenantor in marriage. The plaintiff need not aver or prove a promise on his or her part; and if the plaintiff be a woman, she need not aver or prove an offer by her; "it is well enough without saying *obtulit se* at all, because she was *semper parata*. The man is *ducere uxorem*." (*k*) "The modesty of the sex is considered by the common law," says Lord Coke. "It can hardly be expected that a lady should say to a gentleman, 'I am ready to marry you, pray marry me.'" (*l*)

A woman is doubtless bound by such a covenant as well as a man; yet it would be regarded with more suspicion; and if such an obligation were obtained by a man who gave no corresponding promise on his part, and it were obvious that he intended to bind her but leave himself at liberty, it would probably be set aside in equity. Where the promise is mutual, it was long since settled that an action for a breach of the contract may be maintained against the woman. (*m*)

This action cannot be maintained against an infant; and some question has been made whether an infant can maintain this action; because the promise of the infant being void or voidable, the contract is not mutual, and is without consideration. But in many cases an infant may bring an action

(*j*) *Hebden v. Rutter*, 1 Sid. 180, 1 Lev. 147; *Harrison v. Cage*, Carth. 467; *Stretch v. Parker*, 1 Rol. Abr. 22, pl. 20.

(*k*) *Holcroft v. Dickenson*, 1 Freeman, 347.

(*l*) *Scymour v. Gartside*, 2 D. & R. 57. See *Wells v. Padgett*, 8 Barb. 323. In *Moritz v. Melhorn*, 13 Penn.

331, and in *Wetmore v. Wells*, 1 Ohio State Reps. 26, it is decided that where the defendant's promise is proved, the female may prove her own acts and declarations in order to show her assent. See also *Morgan v. Yarrowborough*, 5 Louis. Ann. 317.

(*m*) *Harrison v. Cage*, 1 Ld. Raym. 386, 1 Salk. 24.

for breach of contract against the adult, where the adult could not sue the infant for a breach on his or her part. It *seems to be distinctly settled that this is so, in the case of a contract to marry. (n)

The very words, or time, or manner of the promise need not be proved; for it may be inferred from circumstances. It may be that this inference is sometimes made too easily, and that juries, or perhaps courts, justify the reproach, that feeble evidence is sometimes held sufficient to prove such a promise. But it must be remembered that such engagements are often, if not usually made without witnesses, and are not often reduced to writing. A requirement of precise and direct testimony would facilitate fraud, more perhaps than in any other class of contracts, and fraud that might work extreme mischief. It has therefore been wisely decided that the contract may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry; as visiting, the understanding of friends and relations, preparations for marriage, and the reception of the party by the family as a suitor.

Where the promise by the defendant was proved, the demeanor of the plaintiff, being that of a betrothed woman, was held to be sufficient evidence of her promise. (o) And

(n) *Holt v. Ward*, Strange, 937; *Willard v. Stone*, 7 Cow. 22; *Hunt v. Peake*, 5 Cow. 475; *Pool v. Pratt*, 1 Chip. 252.

(o) In the case of *Hutton v. Mansell*, 3 Salk. 16, tried before *Holt, C. J.*, the promise of the man was proved, but no actual promise on the woman's side, yet he held that there was sufficient evidence to prove that the woman likewise promised, because she carried herself as one consenting and approving the promise of the man. This question was much discussed in the case of *Wightman v. Coates*, 15 Mass. 1. That was an action of assumpsit on a promise to marry the plaintiff, and a breach thereof by refusal, and having married another woman. At the trial, the evidence of a promise resulted from sundry letters written to the plaintiff by the defendant, and from his attentions to her for a considerable length of time. It was objected by the defendant, that there being

no direct evidence of an express promise, the action could not be maintained. But this objection was overruled by the judge; and the jury were instructed that if, from the letters of the defendant read in evidence, and the course of his conduct towards the plaintiff, they were satisfied that there was a mutual understanding and engagement between the parties to marry each other, they might find for the plaintiff. To this ruling and instruction the defendant excepted, and the case having been carried up, *Parker, C. J.*, delivering the opinion of the court, said:—"As to the technical ground upon which the objection to the verdict now rests, we entertain no doubts. The exception taken is, that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence from which such a promise may have been inferred; and the jury were in-

consent of parents in the presence of a daughter, with the absence of objection on her part, is held to imply her consent; (*p*) nevertheless, language used to third parties, amounting to an expression of intention to marry the plaintiff, but not uttered in the presence of the plaintiff, do not in general prove a promise to marry. (*q*) But statements made to a father, who had a right to make such inquiries, and to receive a true answer, especially where corroborated by visits and the conduct of the parties, are not only sufficient evidence of a promise, but although the statement of the defendant is of a promise to marry the plaintiff in six months, and the count is upon a promise to marry generally, or in a reasonable time, the jury may infer from the statement a general promise to marry. (*r*)

It has been contended that the promise should be in writing, under the clause in the 4th section of the Statute of Frauds, which provides that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage; but the courts of England,

structed that if, from the letters written by the defendant, as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn. Is it then necessary that an express promise in direct terms should be proved? A necessity for this would imply a state of public manners by no means desirable. That young persons of different sexes, instead of having their mutual engagements inferred from a course of devoted attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they consider themselves bound, to call witnesses, or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse which is the pride of our country; and a boldness of manners would probably succeed, by no means friendly to the character of the sex or the interests of society. A mutual engagement must be proved to support this action; but it may be proved by those circumstances which usually accompany such a connection." In *Honyman v. Camp-*

bell, 2 Dow & Clark, 282, the Lord Chancellor said:—"I deny that courtship, or an intention to marry, however plainly made out, can constitute, or, in the language of the Scotch law, is equipollent to a promise. There must be a promise, and the promise must be mutual and binding on both parties; for the law attaches on the promise and not on the intention. But still, courtship is a most material circumstance, when we have to consider whether there was a promise. When we consider how natural it is that lovers should marry, and that marriage is usually the result of courtship, and that in these cases mutual promises are so common, although courtship, or intention, will not supply the place of a promise, yet they come so near, that if these are once made out, we get on a good way towards our journey's end." See, also, *Southard v. Rexford*, 6 Cow. 254; *Weaver v. Bachert*, 2 Barr, 80.

(*p*) *Daniel v. Bowles*, 2 C. & P. 553.

(*q*) *Cole v. Cottingham*, 8 C. & P. 75.

(*r*) *Potter v. Deboos*, 1 Stark. 82.

after once so deciding, (s) have since taken a distinction, *which is certainly a very nice one, between *promises to marry* and promises in consideration of marriage. (t) This clause is not generally contained in the Statutes of Frauds of our States; but it has been held in this country that a promise to marry at the end of five years is within that clause of the statute which requires that a promise not to be performed within one year from the making shall be in writing. (u)

A contract to marry, without specification of time, is, as we have seen, a contract to marry within a reasonable time; each party having a right to reasonable delay, but not to indefinite postponement; nor to delay without reason or beyond reason. If both parties delay the fulfilment of the contract unreasonably, it may perhaps be considered as abandoned by mutual consent, in the absence of evidence to negative this consent.

These contracts, like most others, may be on condition; and if the condition be legal and reasonable, the liability of the parties under it attaches as soon as the condition is satisfied. (v) But it may easily happen that the condition shall be such as to be void, leaving the contract valid; as if it be frivolous or impossible, and evidently introduced by one party in fraud of the other. And it may also happen that the condition shall make the contract void. Thus contracts to marry at the death of parents or relations from whom money is expected, and who are kept in ignorance of the contract, are regarded with great dislike by courts, and would probably be declared void, unless the circumstances cleared them from suspicion. (w) And if the condition were entirely uncertain, or very remote, the contract might be regarded as made in restraint of marriage, as it might prevent either

(s) *Philpot v. Wallet*, 3 Lev. 65.

(t) *Cork v. Baker*, 1 Str. 34; *Harri-son v. Cage*, 1 Ld. Raym. 387.

(u) *Derby v. Phelps*, 2 New Hamp. 515.

(v) *Cole v. Cottingham*, 8 C. & P. 75; *Atchinson v. Baker*, Peake's Add. Cas. 103.

(w) *Woodhouse v. Shepley*, 2 Atk. 539; *Drury v. Hooke*, 1 Vern. 412. In

this last case a bill was brought to be relieved against a marriage brokerage bond; and it appearing that the marriage was brought about without the consent of the young woman's parents, who were then living, the Lord Chancellor "for that reason alone decreed the bond to be delivered up, terming it a sort of kidnapping."

party from marrying for a very long, or for an indefinite period; and it would be held void on that ground. (x)

* If the promise be to marry on request, a request should be alleged and proved; but this is not necessary when the defendant is incapacitated from marrying by his or her own act. (y)

The defences which may be urged against an action to enforce a promise to marry are very numerous. Consanguinity within the Levitical degrees in England, (z) and in this country, those within which marriage is prohibited by the statutes of the several States. So, the bad character of the plaintiff; or his or her lascivious conduct. The cases generally exhibit this defence where the woman is plaintiff; but it ought with equal justice, and on moral as well as on public grounds, to be permitted to the woman when she is defendant; it was so held in the case of *Baddeley v. Mortlock*, (a) and undoubtedly would be so held in this country. If the defence be

(x) *Hartley v. Rice*, 10 East, 22. This was an action on a wager that the plaintiff would not be married in six years. It was endeavored to distinguish this from other contracts in restraint of marriage, on the ground that it was not for life, but for a time certain; it was held, however, that a restraint for a time certain falls within the same policy of the law, and makes the contract void.

(y) *Short v. Stone*, 8 Q. B. 358; *Caines v. Smith*, 15 M. & W. 189; *Harrison v. Cage*, 1 Ld. Raym. 386; *Millward v. Littlewood*, 1 E. L. & E. 408.

(z) In *Harrison v. Cage*, 1 Ld. Raym. 387, it is said that consanguinity within the Levitical degrees may be pleaded in bar or given in evidence under non-assumpsit. It has been sometimes intimated that previous marriage would be a defence. This must be on the ground that the promised marriage would in that case be unlawful, as in the case of consanguinity. But I take the true rule to be, that if the marriage would be unlawful, and this unlawfulness was known to the plaintiff when making the contract, then the plaintiff can sustain no action for the breach of it. Now consanguinity within the prescribed degrees may be presumed to be known to both parties. Not so with

previous marriage. And certainly a married man who promised to marry a single woman, who did not know his marriage, is liable to an action for the breach of his promise, for it was his own fault that he promised what he could not perform. This seems to be taken for granted by court and counsel in *Daniel v. Bowles*, 2 C. & P. 553.

(a) *Holt*, N. P. 151. In this case it was proved that charges had been made against the moral character of the plaintiff, which he did not clear away, and the defendant thereon refused to marry him. *Gibbs*, C. J., said:—"Having promised the plaintiff marriage, she must absolve herself upon some legal grounds. If a woman improvidently promise to marry a man, who turns out upon inquiry to be of bad character, she is not bound to perform her promise. But she must show that the plaintiff is a man of bad character. The accusation is not enough. The facts charged were capable of proof. The existence of the rumor is not sufficient to discharge her from her promise. Without proof that the charges were founded, she is not absolved from her contract. But it affects the damages." The jury accordingly returned a verdict for the plaintiff, damages one shilling.

general bad character, evidence of reputation is receivable ; for, says Lord Kenyon, " character is the only point in issue ; *public opinion, founded on the conduct of the party, is a fair subject of inquiry." (b)

If the defence rest on specific allegations of misconduct, these must be strictly proved ; (c) and if the defendant knew the general bad character, or the specific misconduct, before making the promise, they constitute no defence. (d) False and injurious language used by plaintiff concerning defendant is a good defence. (e) So bad health, if such as to incapacitate from marriage, or render it unsafe or improper. (f)

(b) *Foulkes v. Sellway*, 3 Esp. 236. See also *Morgan v. Yarborough*, 5 Louis. Ann. 316.

(c) *Baddeley v. Mortlock*, Holt, N. P. 151.

(d) *Irving v. Greenwood*, 1 C. & P. 350. This was an action of assumpsit on a promise of marriage. The promise and the breach were clearly made out. But the defendant, to bar the action, gave evidence to show that he eventually broke off the match, because he found that the plaintiff was with child by another man. It was admitted, that, after the promise, the plaintiff had had a child, but it was contended that the defendant was its father. *Abbott, C. J.*, in his summing up to the jury, said :—" If you think that the defendant was not the father of the child, he is entitled to your verdict ; for if any man, who has made a promise of marriage, discovers that the person he has so promised to marry is with child by another man, he is justified in breaking such promise ; and if any man has been paying his addresses to one that he supposes to be a modest person, and afterwards discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage that he may have made to her ; but to entitle a defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest woman, and that the defendant broke his promise on that account ; and they must also be satisfied that the defendant did not know her character at the time of the making of the promise ; for if a man knowingly promise to marry such a person, he is bound to do so." In *Bench v. Merrick*, 1 C. & K. 463, it

was proved that the plaintiff had had a child some ten years before the promise, and had since sustained an irreproachable character. *Atcherley, Serj.*, before whom the case was tried, said : " The great question in this case will be whether you believe that, in the month of February, 1843, the defendant knew the history of the plaintiff in regard to this child. If he did not know it, however great a severity it may be on a woman to rake up a transaction of bygone times, the defendant's second plea will be sustained, and on that plea the defendant will be entitled to the verdict. There is no imputation whatever on the character of the plaintiff except the transaction of 1831. If the defendant, in your opinion, has not established his defence, there will then be the question of damages ; and in that case, in consequence of the misfortune (calling it by no harsher name,) in 1831, the plaintiff cannot be said to be entitled to so large a compensation as one on whose reputation no imputation had ever rested." From this we must infer that if the defendant did know this fact when he made the promise which he had broken, still the fact, though no defence would go to lessen the damages. See also *Boynton v. Kellogg*, 3 Mass. 189 ; *Palmer v. Andrews*, 7 Wend. 142.

(e) *Leeds v. Cook*, 4 Esp. 256.

(f) *Atchinson v. Baker*, Peake's Add. Cas. 103, 124. In this case the plaintiff was a widower upwards of forty years of age, and the defendant a widow about the same age ; when the promise was made, the plaintiff was apparently in good health, but the defendant afterwards discovered that he had an abscess

Entire deafness or blindness, or other important physical incapacity, occurring after the promise, might be a good defence at law; (g) so would the disposal of her property without the consent of the defendant, and in a manner injurious to his interests. (gg) It has been said, also, that if a widow conceals her previous marriage, and betroths herself as a virgin, this would be a fraud, and would avoid the contract. (h) It is going quite far to consider this fact alone as constituting a fraud, but it could seldom occur but under circumstances which would probably determine the character of the concealment; and if this were fraudulent, it must of course have the usual effect of fraud upon the contract; for if obtained by fraud, whatever that fraud may be, the contract is void. A dissolution of the contract by mutual consent would of course be a sufficient defence, but it must be a real and honest consent. (i) But a preëngagement by the defendant is no sufficient defence, (j) nor is the fact that the defendant was married at the time of the promise, but the plaintiff may bring an action immediately upon discovery. (jj) Perhaps it ought to be a good defence, that the plaintiff, when making the contract for the breach of which the action

in his breast, and for that reason refused to marry him. Lord *Kenyon* said, that if the condition of the parties was changed after the time of making the contract, it was a good cause for either party to break off the connection; that Lord Mansfield had held that if, after a man had made a contract of marriage, the woman's character turned out to be different from what he had reason to think it was, he might refuse to marry her without being liable to an action, and whether the infirmity was bodily or mental the reason was the same; it would be most mischievous to compel parties to marry who could never live happily together. The plaintiff was nonsuited, on the ground of a variance; but afterwards brought a fresh action, and rebutted the defendant's testimony as to the abscess, and recovered £4,000 on proof that the defendant had promised to settle £5,000 of her fortune on him, and the residue, £18,000, on herself. A motion was then made for a new trial, on the ground of excessive damages, but the cause was compromised.

(g) *Short v. Stone*, 8 Q. B. 369, Lord *Denman*. A rape wholly without the fault of the woman, would discharge the man from his obligation. Addison on Contr. 584. And in France it seems that loss of a nose would be sufficient. At common law it would hardly be held that a misfortune, which merely affected personal beauty, was a sufficient defence. *Id.*

(gg) *Taylor v. Pugh*, 1 Hare, 114.

(h) Addison on Contr. 581.

(i) See *Southard v. Rexford*, 6 Cow. 264; *Kelly v. Renfro*, 9 Ala. 325.

(j) *Harrison v. Cage*, 1 Ld. Raym. 387. By *Holt*, C. J. "Precontract is a disability, but it will not avoid the performance of your promise, because it proceeds from your own act."

(jj) *Millward v. Littlewood*, 1 E. L. & E. 408. The consideration was said to be that the plaintiff would remain unmarried. *Pollock*, C. B., said that the defendant impliedly promised that there was no impediment to his performing his promise.

is brought, was under an engagement to another party. For instance, if a woman sues a man for a breach of promise of marriage, she must of course show that the promise was reciprocated by her; and if the defendant could then show, that when she made this promise to him she was bound by a previous promise to another, it would seem to be just that she should not *recover for the violation of a contract, her entering into which was a precisely similar violation of contract. But this question does not appear to have been settled by adjudication.

An offer to renew or execute the contract after a refusal should be no defence; nor a change of feeling, nor the fact that another had supplanted the plaintiff in the affections of the defendant. But it would seem, on general principles, to be a good defence, that the promise was made on condition that the plaintiff would commit fornication with the defendant; for such a promise might be void as founded upon an illegal consideration. (k) But it is certainly no defence that the promise was made after fornication, if made with no view to a repetition of the offence, or before fornication, if that were not the consideration of the promise. If the defendant promised that another person should marry the plaintiff, it is no defence that such other person refuses; because the defendant promised on his own responsibility that which another person might prevent from being done.

Damages are peculiarly within the power of the jury in cases of this kind; for courts, both in England and this country, are very unwilling to set aside a verdict in these cases

(k) This would seem to be doubtful from *Morton v. Fenn*, 3 Doug. 211. This was an action for breach of promise of marriage, tried before Lord Mansfield. The evidence was, that the defendant, who was a man of fortune in Jamaica, aged seventy, promised to marry the plaintiff, a widow of fifty-three, if she would go to bed to him that night, which she did, and lived afterwards with him a considerable time. It appeared also that the defendant several times afterwards repeated his resolution to marry her, but that he afterwards married another woman. The jury found a verdict for the plaintiff, with £2,000

damages. A rule *nisi* for a new trial having been obtained, on the ground that it was *turpis contractus*, being on condition of the plaintiff going to bed with the defendant, Lord Mansfield said: — "I thought the objection would not lie on two grounds. 1. That before the marriage act this would have been a good marriage, and the children legitimate by the rules of the common law. 2. I thought so, because the parties were not in *pari delicto*, but this was a cheat on the part of the man." After argument, the court took time to consider, and in the meanwhile recommended the parties to agree that the

/ on the ground of excessive damages. And if the defendant has undertaken to rest his defence, in whole or in part, on the general bad character, or the criminal conduct, of the plaintiff, and fail altogether in the proof, it has been distinctly held that the jury may consider this in aggravation of damages. (l)

* The promise is so far of a personal nature, that the breach of it gives no action to the personal representative of the party injured, unless, perhaps, special damage to the estate

defendant should pay the plaintiff £500, and on a subsequent day Wallace informed the court that the parties had consented to that arrangement. See also *Baldy v. Stratton*, 11 Penn. St. R. 316.

/ (l) *Southard v. Rexford*, 6 Cow. 254. This was an action of assumpsit for breach of promise of marriage. The plea was the general issue, with notice that the defendant would prove in his defence, that the plaintiff had, at various times, and with various persons, specifying them, committed fornication after the alleged promise. At the trial, the defendant attempted to prove this defence, but failed. The case was tried before *Walworth*, Circuit Justice. The learned judge, in charging the jury in reference to the damages said:—"In cases of this kind the damages are always in the discretion of the jury; and in fixing the amount they have a right to take into consideration the nature of the defence set up by the defendant. In his defence he has attempted to excuse his abandonment of the plaintiff, on the ground that she is unchaste, and has committed fornication with different individuals. But it appears from the testimony of his own witnesses that her character in that respect has not been tarnished even by the breath of suspicion. With such a defence on the record, a verdict for nominal or trifling damages may be worse for her reputation than a general verdict for the defendant. If the defendant has won her affections, and promised her marriage, and has not only deserted her without cause, but has also spread this defence upon the record, for the purpose of destroying her character, the jury will be justified in giving exemplary damages." And *Sutherland, J.*, in delivering the opinion of the Supreme Court, said:—

"Upon the question of damages, the charge of the judge appears to me to be unexceptionable. There can be no settled rule by which they are, in every case, to be regulated. They rest in the sound discretion of the jury, under the circumstances of each particular case; and where the defendant attempts to justify his breach of promise of marriage, by stating upon the record, as the cause of his desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages. A verdict for nominal or trifling damages, under such circumstances, would be fatal to the character of the plaintiff; and it would be matter of regret, indeed, if a check upon a license of this description did not exist in the power of the jury to take it into consideration in aggravation of damages." In *Gough v. Farr*, 1 Y. & Jer. 477, it is decided that the court will not, in an action for a breach of promise of marriage, grant a new trial on the ground of excessive damages, unless they be so large as to induce the court to infer that the jury were actuated by undue motives, or acted upon a misconception of the facts. And *Hullock, B.*, said:—"The principle which governs the courts in cases of this description is, not whether they think the damages too large, but whether they be so large as to satisfy the court that the verdict was perverse, and the result of gross error, misconception, or undue motives. There are, I think, no circumstances in this case to warrant such a conclusion. Poverty is pleaded as a ground for inducing the court to interfere; I am not, from the evidence, satisfied that the defendant is unable to pay the damages; but even if he were,

of the decedent is alleged and proved. (*m*) Nor does it survive against the administrator of the promisor. (*n*)

Whether in an action to recover damages for the breach of a promise of marriage, damages for seduction may be recovered, has been much questioned. (*o*) By the strict rules of law, they should, we think, be excluded, where the plaintiff was in actual or constructive service, (*p*) or lived in a State in which the statute law gave her an action for the seduction, and not otherwise; and the weight of authority seems to be so. Where courts held to this rule they would exclude evidence of seduction as irrelevant. But in most cases it would be difficult to exclude this entirely, so as to keep the fact entirely from the jury, without excluding other evidence to which the plaintiff would certainly be entitled. And if the jury were made cognizant of the fact, they would probably regard it in estimating damages; and probably courts would now seldom set aside a verdict on this ground, under any ordinary circumstances. Evidence that the parents of the defendant disapproved of the engagement has been re-

that would not, I apprehend, be a ground for disturbing the verdict. These are questions which must depend upon the circumstances of each particular case: if there were an imputation upon the character of the plaintiff, and the damages were excessive, the court might interfere; nothing of that sort, however, appears in this case."

(*m*) *Chamberlain v. Williamson*, 2 M. & S. 408.

(*n*) *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408.

(*o*) *Perkins v. Hersey*, 1 Rh. Isl. 493, does not permit seduction to be shown in aggravation of damages. So *Burks v. Shain*, 2 Bibb, 341; *Weaver v. Bachert*, 2 Barr, 80. *Contrâ*, *Paul v. Frazier*, 3 Mass. 73; *Conn v. Wilson*, 2 Overton, 233. In *Baldy v. Stratton*, 11 Penn. St. R. 316, it is held that though seduction cannot be given in evidence in an action for breach of promise of marriage, the improper conduct of the defendant, in which the plaintiff did not participate, may be so given in aggravation of damages. So loss of time, and expenses incurred in preparations

for marriage, are grounds of damage, directly incidental to the breach of a promise of marriage, but not of special damage. In *Tullidge v. Wade*, 3 Wils. 18, and *Foster v. Schofield*, 1 Johns. 297, it was held that in an action for seduction, the promise of marriage could not be given in evidence. But this rule—if it be law—is not usually regarded in practice. In *Wells v. Padgett*, 8 Barb. 324, (published since the first edition of this work,) it is decided that in an action for breach of promise, the seduction of the plaintiff is to be regarded as a breach of the promise in all cases in which it is followed by abandonment and a refusal to marry, and is to be considered by the jury in estimating the damages. The same doctrine is held in *King v. Kersey*, 2 Cart. (Ind.) 402.

(*p*) That is, in service to one who could bring the action. In *Postlethwaite v. Parkes*, 3 Burr. 1878, the plaintiff hired herself to defendant, who seduced her and then turned her away when pregnant, and she returned to her father, and the father brought an action *per quod servitium*; and it was held that the action was not maintainable.

ceived in mitigation of damages. (*q*) A bill in equity has been sustained to compel a party to discover whether he has promised to marry the plaintiff. (*r*)

SECTION II.

PROMISES IN RELATION TO SETTLEMENTS OR ADVANCES.

A promise to give to a woman, or settle upon her, a specific sum or estate on her marriage, is valid. Marriage is regarded as one of the strongest considerations in the law, either to raise a use, or to found a contract, gift, or grant. (*s*) But such promises are certainly within the Statute of Frauds, as made "in consideration of marriage," (*t*) although a promise to marry may not be. They must therefore be in writing, in England, and in those of our States which have enacted this clause of the Statute of Frauds. And the celebration of the marriage is not such part performance of the contract as takes it out of the statute. (*u*) But the Court of Chancery has frequently interfered, where there was a writing, and in some instances where there was none, to compel parties to carry into effect the intentions of such a contract, or the expectations justly raised by the conduct and declarations of

(*q*) *Irving v. Greenwood*, 1 C. & P. 350.

(*r*) *Vaughan v. Aldridge*, *Forrest's Rep.* 42.

(*s*) *Holder v. Dickeson*, 1 *Freem.* 96; *Smith v. Stafford*, *Hob.* 216; *Waters v. Howard*, 8 *Gill*, 262.

(*t*) *Randall v. Morgan*, 12 *Ves.* 67. In this case it is doubted whether a settlement after marriage, founded upon a parol agreement before marriage, could be sustained against creditors. The same question occurred in *Dundas v. Dutens*, 1 *Ves. Jr.* 196, and Lord *Thurlow* seemed to think such settlement might be valid. He says to counsel: "I should be glad to hear you support it, (that is, his objection to such settlement,) though it is mere matter of curiosity, if the first point be against you." This question does not seem to be distinctly settled. Perhaps the courts

would take this distinction; where the property was the wife's, and had come to the husband by a marriage made after a promise to secure it to her, a settlement in fulfilment of the promise would be sustained against creditors, because they lose nothing by it; but not so if the property had been originally the husband's.

(*u*) *Dundas v. Dutens*, 1 *Ves. Jr.* 196; *Montacute v. Maxwell*, 1 *P. Wms.* 618, 1 *Strange*, 236. In *Simmons v. Simmons*, 6 *Hare*, 352, it is said that although a parol agreement by the husband, made before marriage, that the wife should possess certain chattels for her own use, is not binding upon him, yet if the parties voluntarily place the property under the dominion of trustees as part of the property under trust, the agreement may then be made effectual.

relatives and friends. (v) But a mere representation concerning the property or prospects of a party about to be married, if made in good faith, will not bind a party to make it good, even in equity, although the representation be untrue in fact. (w) Letters from parents, or persons standing *in loco parentis*, promising provisions, if sufficiently specific and explicit, have been held to satisfy the requirements of the statute. (x)

*Contracts have been frequently declared void, on the ground that they were in fraud of settlements and marriage portions, or promises thereof. As where a private bargain was made with the husband, or even with husband and wife, to pay back a part of the wife's portion; (y) or to return a part of an annuity or other provision apparently given to a son to enable him to marry; (z) or to restore money given to impart to one an appearance of wealth by which he may induce another to marry him. (a) A note given fraudulently to induce a marriage contract is good against the maker. (b) So creditors who conceal or deny debts due to them from a man about to be married, that their debtor may get the consent of the woman or her parents to the marriage, are bound by such representations as effectually as by a release. (c) Any private agreement impairing or avoiding an

(v) *Hunsden v. Cheyney*, 2 Vern. 150; *Beverley v. Beverley*, 2 Vern. 131.

(w) *Mercwether v. Shaw*, 2 Cox, 124.

(x) *Bird v. Blosse*, 2 Vent. 361; *Seagood v. Meale*, Prec. Ch. 561; *Cookes v. Mascall*, 2 Vern. 200; *Moore v. Hart*, 1 Vern. 110; *Wankford v. Fotherley*, 2 Vern. 322. In this case £3,000 were decreed to be paid on the strength of a letter proved to have been written by his (the father's) direction, wherein it was said he would give £3,000 portion with his daughter; and that he was afterwards privy to the marriage, and seemed to approve thereof. See also *Ayliffe v. Tracy*, 2 P. Wms. 65; *Douglas v. Vincent*, 2 Vern. 201. In this case an uncle promised by letter to give his niece £1,000, "but in the same letter he dissuaded her from marrying the plaintiff;" and the court refused to decree payment of the sum, but left the plaintiff to his action at law.

(y) *Turton v. Benson*, 1 P. Wms. 496, 2 Vern. 764; *Pitcairn v. Ogbourne*, 2 Ves. Sen. 375. See also *Jackson v. Duchaire*, 3 T. R. 552.

(z) *Peyton v. Bladwell*, 1 Vern. 240; *Palmer v. Neave*, 11 Ves. 165; *Morison v. Arbuthnot*, 8 Bro. P. C. 247.

(a) *Scott v. Scott*, 1 Cox, 357; *Thomson v. Harrison*, 1 Cox, 344. In this last case Lord *Thurlow* says:—"It is a rule, in cases of frauds on marriage, that although the husband be a party to such fraud, yet his interest is not to be affected, since it is impossible to make him liable in respect thereof, without involving the wife and children, and the family upon whom the deceit has been practised. See also *Gale v. Lindo*, 1 Vern. 475.

(b) *Montefiori v. Montefiori*, 1 Wm. Bl. 363.

(c) *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Bro. C. C. 543.

open and public treaty of marriage, is considered fraudulent; and it is sometimes laid down as a principle, that whoever acts fraudulently in such cases shall not only not gain, but shall lose by his fraud.

SECTION III.

CONTRACTS IN RESTRAINT OF MARRIAGE.

These contracts are wholly void. It has been held that a promise to a woman to marry no one but her was such a contract. *(d)* So a bond by a widow not to marry again. *(e)* So a wagering contract that the party would not marry within six years. *(f)* But a promise by one with whom a woman had cohabited, to pay her an annuity for life provided she remained single, was held to be good. *(g)*

There are certain contracts spoken of in English books as "marriage brokerage or brokerage contracts." They are contracts for payment of money, or some other compensation, for the procuring a marriage; and they are held to be void, both in law and equity, as against policy and morality. Courts in England are very hostile to any contract of this nature or effect; particularly if made with a guardian, or with a servant, or one to whose selfish and injurious influence the party would be much exposed. Such a contract is set aside, without reference to the propriety or expediency of the marriage. *(h)*

(d) *Lowe v. Peers*, 4 Burr. 2225.

(e) *Baker v. White*, 2 Vern. 215.

(f) *Hartley v. Rice*, 10 East, 22, cited in note *(x)*, p. 548. In *Sterling v. Sinickson*, 2 South. 756, a bond to pay \$1,000, if the obligee (the plaintiff,) were not married within six months, was declared void.

(g) *Gibson v. Dickie*, 3 M. & S. 463. See also *Lloyd v. Lloyd*, 10 E. L. & E. 139.

(h) *Stribblehill v. Brett*, 2 Vern. 445. In this case a lease was set aside, "upon surmise that the consideration of the lease was Col. Brett's (the lessee's) undertaking to procure a marriage to be had between Mr. Thynn (the lessor) and the Lady Ogle," although the lease

was not made until six months after the marriage; as appears from the case as reported in 1 Bro. P. C. 57. See also *Hall v. Potter*, 3 Lev. 411, Show. P. C. 76. This too arose from Mr. Thynn's desire to marry Lady Ogle. He gave an obligation to Mrs. Potter for £1,000, conditioned to pay £500 within three months after he should marry Lady Ogle. A bill was brought by Thynn's executors for relief against the bond. Their ground was, that Mrs. Potter only advised Thynn to apply to Brett, so that she did nothing to earn the money, and next that such contracts were of dangerous consequence. The defence was, that the "marriage was suitable in respect of their estates,"

SECTION IV.

CONTRACTS OF MARRIAGE.

The relation of marriage is founded upon the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness. No legal topic surpasses it in importance; and some of the questions which it suggests are of great difficulty.

The first which presents itself is, what constitutes a legal marriage. It is impossible that any question should be more important to any one in itself, or in the consequences which it involves, than whether he or she is or is not a husband, or a wife; and yet some uncertainty may often rest upon it, not merely from the peculiar facts of individual cases, but from a want of precision and certainty in the principles or rules which decide this question.

The Roman civil law declared, that "*sufficit nudus consensus ad constituenda sponsalia.*" (i) Chancellor Kent quotes another passage from the Digest, "*Nuptias, non concubitus, sed consensus facit,*" and adds:—"This is the language equally of the common and canon law, and of common reason." (j) If this means that the consent of the parties is the essence of marriage, and that the ceremonies of celebration are but its form, this is undoubtedly true. But it is said consent *suffices* for marriage, *makes* marriage; and if this be literally taken, we suppose it open to doubt whether this be law in any of the countries of Christendom, at this moment. Even the Roman civil law says, "*justas autem nuptias inter se cives Romani contrahunt, qui secundum precepta legum coeunt.*" (k) In Scotland it is, or was, the law, that consent, manifested by declaration before witnesses, and followed by consummation, constituted a legal marriage. (l) Hence the practice of resorting, by those in England who wished to escape the marriage laws of that country, to Gretna Green,

and, "that Thynn's estate was £10,000 a year, and he a gentleman of a great family, though not of the nobility." But the bond was declared void by the lords reversing the decree in Chancery. See also *Smith v. Brunning*, 2 Vern. 392.

(i) Dig. Lib. 23, tit. 1, § 4.

(j) 2 Kent's Com. 87.

(k) Inst. Lib. 1, tit. 10.

(l) It is not quite certain that cohabitation was necessary by the Scotch law to constitute a legal marriage, if the

which was the village in Scotland most accessible from England. But even this was "*consensus et concubitus*;" not "*consensus non concubitus*." In England the common law provided no special form or mode, but the whole matter was under the ecclesiastical or canon law; but the statutes of England are, and for some time have been, precise and stringent, if not, as some there have thought, severe. In all Christian countries of which we have any knowledge, and as we suppose in all civilized countries, certain ceremonies are prescribed for the celebration of marriage, either by express law, or by a usage which has the force of law. And the question is, whether a mere consent of the parties, even with mutual promises, but without any use of or reference to any of these ceremonies, is sufficient to constitute a valid marriage. In the case of *Milford v. Worcester*, (*m*) the Supreme Court of Massachusetts gives a somewhat elaborate statement of the reasons which led them to the conclusion that a marriage is not valid if it do not conform to the statutory requirements. In New Hampshire, in the case of *Clark v.*

contract were *in verba de præsenti*. For a very full and learned discussion of the law of Scotland concerning marriage, see *Dalrymple v. Dalrymple*, 2 Haggard's Consist. Rep. 54, and the appendix to that volume.

(*m*) 7 Mass. 48. In this case *Parsons*, C. J., said:—"Marriage being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages, by defining the characters and relations of parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families; by describing the solemnities by which the contract shall be executed, so as to guard against fraud, surprise, and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and to discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals, and a dissolution of manners; and by declaring the causes and the judicature for rescinding the contract, when the conduct of either party and the interest of the State authorize a dissolution. A marriage con-

tracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage. Where the laws of any State have prescribed no regulations for the celebration of marriages, a mutual engagement to intermarry, by parties competent to make such a contract, would in a moral view be a good marriage, and would impugn no law of the State. But when civil government has established regulations for the due celebration of marriages, it is the duty, as well as the interest, of all the citizens, to conform to such regulations. A deviation from them may tend to introduce fraud and surprise in the contract; or by a celebration without witnesses the vilest seductions may be practised under the pretext of matrimony. When, therefore, the statute enacts that no person but a justice or a minister shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from solemnizing their own marriages by any form of engagement, or in the presence of any witnesses whatever. If this be

Clark, (*n*) the court say:—"But in most governments the contract is held to be valid and binding, notwithstanding it is entered into with no rites or ceremonies." But they had said before, "it is a contract and relation—to be regulated—not by the mere will of the parties, but by the general provisions of the municipal law." But how can a contract be said to be *regulated*, *not* by the mere will of the parties, but by the provisions of law, if the mere will of the parties controls these provisions, and they have no force or effect whatever, if only the parties chose to disregard them.

That evidence of marriage, from cohabitation, acknowledgment by the parties, reception by the family, connection as man and wife, and general reputation, is receivable in nearly all civil cases, has been distinctly held. (*o*) This, however, proceeds upon the ground of the actual probability of a regular marriage, where such evidence exists. In New York this presumption has been pushed very far. (*p*)

not a reasonable inference, fruitless are all the precautions of the legislature. . . . A marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized." In *Fenton v. Reed*, 4 Johns. 54, the court say:—"No formal solemnization of marriage is requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage, and is as valid as if made *in facie ecclesiæ*." The opinion was probably given by Mr. Chief Justice Kent, who uses the same language in the first edition of his commentaries. But the remark is somewhat *obiter*, and perhaps did not receive the particular attention of the court; the case being decided on the ground that the circumstances of the case warranted an inference of actual marriage.

(*n*) 10 New Hamp. 383.

(*o*) *Read v. Passer*, 1 Esp. 213, Peake's Cas. 231; *Hervy v. Hervy*, 2 Wm. Bl. 877; *Leader v. Barry*, 1 Esp. 353. In *Morris v. Miller*, 4 Burr. 2058, Lord Mansfield held that proof of marriage from cohabitation, name and reception of the woman by everybody as the man's wife, was certainly receivable in all cases except two, one a prosecu-

tion for bigamy, and the other an action for criminal conversation; and this last, he says, is a sort of criminal action.

(*p*) *Fenton v. Reed*, 4 Johns. 52. The only point in controversy in this case was whether the defendant was the widow of one William Reed. It appeared that in the year 1785 she was the lawful wife of one John Guest. Sometime in that year Guest left the State for foreign parts, and continued absent until sometime in the year 1792, and it was reported and generally believed that he had died in foreign parts. During the year 1792 the defendant was married to Reed, and afterwards in the same year Guest returned to the State of New York, and continued to reside therein until June, 1800, when he died. He did not object to the connection between the defendant and Reed, and said that he had no claim upon her, and never interfered to disturb the harmony between them. After the death of Guest, the defendant continued to cohabit with Reed until his death in September, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the defendant and Reed subsequent to the death of Guest. Upon these facts the court held that the marriage of the defendant with William Reed, during the lifetime

Mr. Chancellor *Kent*, in the fifth and subsequent editions of his Commentaries, says:—"If the contract be made per verba de præsenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, *in the absence of all civil regulations to the contrary.* (q) In his four first editions he omitted the words which we have italicized. But these words seem to us extremely material. They make the statement accurate and certain. They leave, however, the real question undecided for all practical purposes; for in what civilized land is there an absence of all civil regulations to the contrary? In the case of *Jewell's Lessee v. Jewell*, which came before the Supreme Court of the United States, (r) on error from the Circuit Court for the District of South Carolina, this precise question came up. The court below cited the above passage from *Kent*, but from an early edition, and therefore without the very material clause we italicize, and instructed the jury that this was law. Exceptions were taken, and the case was carried to the Supreme Court of the United States, where *Taney*, C. J., in giving the opinion of the court, refers to this instruction, and says:—"Upon the point thus decided, this court is equally divided; and no opinion can therefore be given." (s) In consequence of this

of John Guest, was null and void; that she was then the lawful wife of Guest, and continued so until his death in 1800; but that the facts and circumstances of the case were sufficient to authorize a jury to infer that an actual marriage took place between the defendant and Reed subsequent to the death of Guest. See also *Starr v. Peck*, 1 Hill, 270. In this case, on a question as to the legitimacy of A., it appeared that her parents had been intimate in the way of courtship for nearly a year before her birth—that they intended to be married—that the father being a seafaring man, left on a voyage, and was accidentally detained longer than he expected—that A. was born a few days before his return—that within a week or so afterwards they were publicly married by a clergyman—that they subsequently cohabited as husband and wife for many years, and until their separation by death, always treating A.

as their legitimate child. The court held that these facts were sufficient to warrant a jury in finding that a marriage in fact existed previous to A.'s birth, notwithstanding the ceremony which took place afterwards. *Bronson, J.*, dissented. See also *Piers v. Piers*, 2 House of Lords Cases, 331; *Clayton v. Wardell*, 4 Coms. 230.

(q) 2 Kent's Com. 87.

(r) 1 How. 219, 234. In this case, and in *Londonderry v. Chester*, 2 New Hamp. 268, all the leading authorities upon this difficult question are cited.

(s) In the case of *The Queen v. Millis*, 10 C. & Fin. 534, on appeal from Ireland to the House of Lords, the lords were equally divided on the same question; Lord *Brougham*, Lord *Denman*, and Lord *Campbell*, being in favor of the validity of the marriage at common law, and Lord *Lyndhurst*, Lord *Cottenham*, and Lord *Abinger*, against it. The question had been referred by the

decision, Mr. *Kent* added in his next and subsequent editions the words we have italicized in the extract from his Commentaries; and also, from a cautiousness that was certainly carried to an extreme, stated in a note that "the Supreme Court were equally divided in respect to the above paragraph or proposition in the text;" but the precise proposition in the text, that is, with the added clause, was never before the court; nor do we think that any court would have been divided upon it. Their division was upon the question whether such a contract of marriage be valid without reference to the presence or absence of municipal regulations, and this question must therefore be considered as an open one. In *Clayton v. Wardell*, 4 Comst. 230, it is declared to be the rule of the common law, that "a valid marriage may exist without any formal solemnization;" but the marriage in that case was denied for other reasons; and we know of no case in which a mere agreement to marry, with no formality and no compliance with any law or usage regulating marriage, is actually permitted to give both parties and their children the rights, and lay them under the obligations and liabilities, civil and criminal, of a legal marriage. (t) It may be remarked that the practice of the courts in this country, in one respect, seems directly opposed to the rule that "if the contract be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and is equally binding as if made *in facie ecclesiæ*." (u) For

lords to the judges, and *Tindall*, C. J., in behalf of the judges, gave their unanimous opinion against the validity of the marriage, and held, that by the law of England, as it existed at the time of the marriage act, a contract of marriage *per verba de presenti* was indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law.

(t) It would be impossible to discuss this subject fully, either in the text or in the notes, without occupying too large a space. I would refer, therefore, to a very elaborate, and, as I think, accurate, investigation of the authorities and the law, in *Jacop's Addenda to Roper on Husband and Wife*, vol. 2, pp. 445 to 475. I cannot but think that he places upon strong grounds his conclusion that a contract of marriage *in verba de presenti*, without ceremony or celebration of any kind, does not constitute a valid marriage at common law.

(u) In *Queen v. Millis*, 10 C. & F. 534, it seemed to be the universal opinion that marriage, *per verba de futuro cum copula*, and marriage *per verba de presenti* have absolutely the same va-

a very large proportion of the cases in which an action is brought for breach of promise of marriage come within this definition. The man promised marriage, the woman accepted and returned the promise, and thereupon yielded to his wishes. It is a question, which we have already considered, how far the seduction may be given in evidence, in this action to swell the damages; but in some way or other, if the fact exists it is usually brought out. Then it becomes a case of marriage, falling within that rule. But such a defence was never made by the party, nor interposed by the court. It is true that the man would not be likely to make this defence, for that would be to acknowledge himself the husband of the plaintiff. But if, in such an action, it should appear that the parties had celebrated a regular marriage, *in facie ecclesiæ*, and were unquestionably husband and wife, certainly the court would not wait for the defendant to avail himself of that fact, but as soon as it was clearly before them would stop the case. For if they were once married, no agreement of both parties, and no waiver of both or either, would annul the marriage. And the circumstance that this objection is never made, where it appears that there was a mutual promise and subsequent cohabitation, would go far to show that the courts of this country do not regard such a contract, although followed by consummation, as equivalent to a marriage in which the formalities sanctioned by law or usage are observed. It might be added that such a provision as that contained in the Revised Statutes of Massachusetts, (v) (which has been elsewhere enacted,) would seem to be wholly unnecessary, if words of present contract, with consummation, were all that is needed to render marriage valid.

In a late case in Massachusetts (vv) the court say: "But

lidity, force, and effect, whatever that may be. *Pratt, J.*, in *Clayton v. Wardell*, denies this.

(v) Ch. 75, sect. 24. The provision contained in that section is as follows: No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed

justice or minister, or on account of any omission or informality in the manner of entering the intention of marriage, or in the publication of the banns; provided, that the marriage be in other respects lawful, and be consummated with a full belief, on the part of the persons so married, or of either of them, that they have been lawfully joined in marriage."

(vv) *Parton v. Hervey*, 1 Gray, 119.

in the absence of any provision declaring marriage not celebrated in a prescribed manner or between parties of a certain age, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, although had in violation of the specific regulations imposed by statute." This language differs somewhat from any used elsewhere, but it leaves the question undetermined, because it does not decide how marriages are to be "regularly made according to the common law;" and what is more important, the words of the court must be considered in reference to the case before them, which was whether a marriage otherwise valid, could be avoided by the fact that the wife being but thirteen years of age was married without the consent of her parents, which marriage the magistrate was on that account prohibited from solemnizing, under a penalty. The court determined that in Massachusetts the common law rule which fixes twelve as the age of consent of females and fourteen of males, prevails.

But a precise compliance with all the requirements of law has not been deemed necessary; and in some important provisions it has been held that a disregard of them was punishable, but did not vitiate the marriage; as the want of consent of parents or guardians where one party is a minor, or an omission of the publication of banns. The essential thing seems to be the declaration of the consent, by both parties, before a person authorized to receive such declaration, by law. (*w*)

* Consent is the essence of this contract, as of all others. It cannot be valid, therefore, if made by those who had not sufficient minds to consent; as by idiots or insane persons. (*x*) Such marriages are, doubtless, void at common law, and by the statutes of many States. It is usual, how-

(*w*) *Parton v. Hervey*, 1 Gray, 119; *Milford v. Worcester*, 7 Mass. 48; *Ligon v. Buxton*, 2 Greenl. 102; *London-derry v. Chester*, 2 N. H. 268.

(*x*) *Elliott v. Gurr*, 2 Phillimore, 19; *Browning v. Reane*, Id. 69; *True v. Ranney*, 1 Foster, 52. But it is said in *Vin. Abr. Marriage*, (D.) pl. 3, "If an idiot contracts marriage it shall bind

him," and authorities are cited to that effect. And in *Shaffer v. The State*, 20 Ohio, 1, it was held that marriages by boys under 18 and girls under 14 years of age are invalid unless confirmed by cohabitation subsequent to those ages, and do not [subject the parties marrying to the punishment of bigamy upon remar-

ever, and far better, that the marriage should be declared void by a competent tribunal, after a judicial ascertainment of the facts. Courts having full equity powers may make this inquiry and decree. (*y*) But some of the States have provided for doing this by common law courts.

From the same necessity of consent, a marriage procured by force or fraud is also void; but the force and fraud must be certain and extreme. (*z*) So if another husband or wife of either of the parties be living. (*a*) Bigamy, or, as it should be called, polygamy, is an indictable offence in all the States; but exceptions are made in cases of long absence, with belief of the death of the party, &c. But these exceptions to the criminality of the act leave the question as to the validity of the second marriage as they were before. (*b*) So if the parties are within the prohibited degrees of kindred. (*c*) The age of consent to marriage, by the rules of the common law, as stated by Coke, (*d*) is fourteen for the male and twelve for the female; these rules are borrowed, perhaps, from the *Roman law, with which they agree; although the Roman law appears to have provided also that parties were marriageable whenever they had arrived at puberty. If the marriage take place when one is of sufficient age — as the husband of fifteen — and the other within the age of consent, — as the wife of ten, — when the wife reaches twelve, the husband may disagree and annul the mar-

(*y*) *Wightman v. Wightman*, 4 Johns. Ch. 343. In *True v. Ranney*, 1 Foster, 52, the court assumed the power of declaring a marriage null for imbecility of the woman, on a petition of her next friend. So also in a case of insanity of the wife which was kept concealed from her husband by her friends. *Keyes v. Keyes*, 2 Fost. 554.

(*z*) *Dalrymple v. Dalrymple*, 2 Hag. Consist. Rep. 104; *Sullivan v. Sullivan*, Id. 246.

(*a*) *Riddlesden v. Wogan*, Cro. Eliz. 858; *Pride v. Earl of Bath*, 1 Salk. 120; *Martin's Heirs v. Martin*, 22 Ala. 86.

(*b*) So at least say the court in *Fenton v. Reed*, 4 Johns. 53.

(*c*) *Sutton v. Warren*, 10 Met. 451. In this case it was held that the intermarriage of a man and his mother's sister, though void by the law of Massa-

chusetts, is not incestuous by the law of nature, and was not void by the law of England before the statute of 6 Wm. 4, c. 54, though it was voidable by process in the ecclesiastical court. In *Bonham v. Badgley*, 2 Gilman, 622, it was decided that a marriage between a man and the daughter of his sister, although within the Levitical degrees, was not void, but only voidable; that for all civil purposes such marriages are valid until sentence of nullity or separation; and that this sentence can be passed only during the lives of both parties. The children, therefore, of such marriage, after the death of either party, no sentence of nullity having been passed before such death, are legitimate; and if the husband die, the wife may have her dower.

(*d*) Co. Litt. 78, b.

riage. Such, at least, is the rule as laid down by Coke. (e) He adds that they cannot disagree before the age of consent; but this may be doubted; and the Revised Statutes of Massachusetts seem to assume that they may disagree within nonage.

The consent of parents or guardians to the marriage of minors is required by the Roman law, the marriage acts of England, and by the statutes of some of our States; but not by common law, nor in England until the stat. of 26 Geo. 2, ch. 33. The English statute makes the marriage of minors, without such consent, absolutely void. In this country that would depend upon the statutes of the several States. Generally, if not universally, the marriage would be held valid, although the person celebrating it might be punishable. (f)

It has been held in England that a marriage, not lawfully celebrated, by reason of the fraud of one of the parties, shall yet be held valid in favor of the innocent party. As in case of a misnomer of the wife by the husband's fraud. (g) So where the husband falsely imposed upon the wife a forged or unauthorized license, and a pretended clergyman. (h) In *the statutes of some of the States there are provisions to the same effect.

The operation of the *lex loci* upon marriage, and the rights of the married parties, has given rise to some questions, which we shall consider in our second volume, when we treat of the Law of Place.

(e) Co. Litt. 79, b.

(f) It has been so decided in Massachusetts. *Parton v. Hervey*, 1 Gray, 119.

(g) *King v. Wroxtton*, 4 B. & Ad. 640. It is held in this case that a marriage is not void because the banns were published under false names, unless both parties were privy to such false publication. See also *King v. Billingshurst*, 3 M. & S. 250. In a note to this case are given at length *Frankland v. Nicholson*, *Pougett v. Tompkins*, and *Mather v. Ney*, decided by Sir W. Scott, in all of which the banns were erroneous in the name of one of the parties, and the marriage was declared void *ab initio*. But in the two first cases there were circumstances of fraud.

Heffer v. Heffer, *Tree v. Quin*, and *Mayhew v. Mayhew*, decided by the same judge, are also cited in the same note. In these there was an error of the name, but the marriages were not annulled. From all the cases taken together, it might perhaps be inferred that a mere error in the name would not make a marriage void, (especially if a name acquired by reputation were used,) unless there were circumstances of fraud, or other objection. But in *Cope v. Burt*, 1 Hagg. Consist. 438, Sir W. Scott seems to insist that it is essentially necessary that the banns should be published in the true names.

(h) *Dormer v. Williams*, 1 Curteis, 870; *Lane v. Goodwin*, 4 Q. B. 361; *Clowes v. Clowes*, 3 Curteis, 185.

SECTION V.

DIVORCE.

Neither the common law nor the equity courts of England decree divorce. Almost all questions of marriage are there decided by the spiritual courts, having been originally under the cognizance and jurisdiction of the bishops. The spiritual courts sometimes decree that a marriage was void *ab initio*, and sometimes grant a divorce from bed and board, but never a divorce from the bond of marriage. This complete divorce occurs in England only when parliament, by a private act made for the case, annuls a marriage. But it is not so in this country. Very early in the settlement of New England, as we learn from Mather's *Magnalia*, the question was put to the clergy whether adultery was a sufficient cause for divorce; and they answered that it was. The courts of law thereafter decreed divorce in such cases, and this law and practice became nearly universal through this country. For many years, however, a divorce *a vinculo* was granted for no other cause than adultery, the law being made to conform to what was regarded as the positive requirement of Scripture. At length, however, the severity of this rule was modified. Divorce *a vinculo* was permitted for other causes; as desertion, cruelty, sentence to long imprisonment, and the like. The law and practice in this respect differs in the different States, being precisely alike in no two of them. And in some, the facility of obtaining a divorce has certainly been carried quite far enough.

A divorce *a vinculo* annuls the marriage altogether; and it restores the parties to all the rights of unmarried persons, and relieves them from all the liabilities which grew out of the marriage, except so far as may be provided by statute, or made a part of the decree of divorce by the courts. Thus, it is a provision of some of our State statutes on this subject, that the guilty party shall not marry again. And the court generally have power to decree *terms* of separation, as to

alimony, care and possession of children, and the like. In practice, proper precautions are used to prevent a divorce from being obtained by collusion; it not being granted merely upon the consent or on the default of the party charged, but only on proof of the cause alleged. (n)

The courts may also decree a divorce *a mensa et thoro*; and this kind of divorce was once the most common. But most of the causes which formerly only sufficed for a divorce from bed and board, are now very generally made sufficient for a divorce from the bond of marriage. In general, a woman divorced from the bed and board of her husband acquires the rights, as to property, business, and contracts, of an unmarried woman. And her husband is freed from his general obligation to maintain her, the courts having power, which they usually exercise, of decreeing such maintenance from the husband as his means, and the character and circumstances of the case render proper. (o)

(n) Indeed, so careful are the courts to guard against any collusion between the parties, one of whom has applied for a divorce, that although the respondent be defaulted, yet the alleged cause of divorce must be as distinctly and satisfactorily proved as in other instances. So likewise must the fact of marriage. *Williams v. Williams*, 3 Greenl. 135. And a divorce *a vinculo*, for the adultery of the husband, has been frequently refused where the *only* proof was the defendant's admission of the fact. *Holland v. Holland*, 2 Mass. 154; *Baxter v. Baxter*, 1 Mass. 346. And this is done to avoid the possibility of collusion. But if it distinctly appear that the confessions were given under circumstances showing there was no collusion, the defendant's confessions are held sufficient. *Billings v. Billings*, 11 Pick. 461; *Vance v. Vance*, 8 Greenl. 132; *Owen v. Owen*, 4 Hagg. Eccl. R. 261. So the record of the conviction of the party upon an indictment for the same offence is admissible after default, and is sufficient proof of the marriage and the crime. *Randall v. Randall*, 4 Greenl. 326; *Anderson v. Anderson*, Id. 100. Unless such conviction was had upon the testimony of the wife as

it might have been where the charge in the indictment was an assault and battery upon her. *Woodruff v. Woodruff*, 2 Fairf. 475.

(o) *Dean v. Richmond*, 5 Pick. 461, where it was held that a wife divorced *a mensa et thoro* may be sued, or sue, as a feme sole. *Parker, C. J.*, in delivering the opinion of the court, after quoting from Kent's Commentaries, vol. 2, p. 136,) as "a recently published book, which I trust, from the eminence of its author, and the merits of the work, will soon become of common reference in our courts," says:—"So far as this opinion relates to the case of divorce, we fully concur with him, and are satisfied that, although the marriage is not to all purposes dissolved by a divorce *a mensa et thoro*, it is so far suspended that the wife may maintain her rights by suit, whether for injuries done to her person or property, or in regard to contracts express or implied arising after the divorce; and that she shall not be obliged to join her husband in such suit; and to the same extent she is liable to be sued alone, she being to all legal intents a feme sole in regard to subjects of this nature. Such, however, is not the law of England, it having

been recently decided that coverture is a good plea, notwithstanding a divorce *a mensa et thoro*. *Lewis v. Lee*, 3 B. & C. 291. But the difference in the administration of their law of divorce and ours, and the power of the Court of Chancery there to protect the suffering

party, will sufficiently account for the seeming rigor of their common law on this subject. If the husband is not liable for the debts of the wife, after a divorce *a mensa*, the chief reason for denying her the right to sue alone fails." See also *Pierce v. Burnham*, 4 Met. 303.

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CHAPTER XII.

BAILMENT.

THE Law of Bailment has received in modern times a more systematic arrangement than formerly, and a more profound and accurate investigation into its principles. But it was always, though not under the same name, a branch of the common law, and some of its principles are as ancient as any part of that law. Sir William *Jones* speaks of it as referred to in the books of Moses, and as quite fully developed among the Greeks. But in fact, much law on the topics which are now considered under the head of Bailment, must exist in all nations who make any approach to civilization. For there must always be something of borrowing, lending, hiring, and of keeping chattels, carrying or working upon them, for another; and all this is embraced within Bailment. The word is from the Norman French *bailler*, to deliver. Whatever is delivered by the owner to another person, in any of the ways or for any of the purposes above mentioned, is bailed to him; and the law which determines the rights and duties of the parties, in relation to the property and to each other, is the law of Bailments.

Sir William *Jones*, in 1781, published his brief essay on the law of Bailments. This work first gave to the subject systematic form. It was at that time eminently useful, and has always been celebrated. As a literary and philosophical production, manifesting much learning in the Roman civil law, it has great merit; but as a law-book for present use, it possesses now less value. In the 2 Anne, Lord *Holt*, in the case of *Cogg v. Bernard*, (p) laid the foundation of this sys-

(p) 2 Ld. Raym. 909. This celebrated case is referred to in the great majority of subsequent cases which relate to the responsibility of a bailee. In this

case that eminent judge, Sir John *Holt*, may be said to have laid the foundation of the Law of Bailment for England. He borrows most, perhaps all,

tem of law, building it, however, on principles deducible from or harmonizing with existing English jurisprudence, although he used an arrangement and nomenclature borrowed from the civil law.

A bailee is always responsible for the property delivered to him ; but the degree and measure of this responsibility vary from one extreme to another. He is bound to take care of the property ; but the question always occurs, what care ? It is obviously impossible to measure the requirement of *care* with exact precision. But, for their assistance in doing this, courts have established three kinds or degrees of care, as standards. There is, perhaps, no better definition of these, than that given by Sir William *Jones*. First, slight care, which is that degree of care which every man of common sense, though very absent and inattentive, applies to his own affairs ; secondly, ordinary care, which is that degree of care which every person of common and ordinary prudence takes of his own concerns ; thirdly, great care, which is the degree of care that a man remarkably exact and thoughtful gives to the securing of his own property. It is obvious that the degree of care required measures the degree of negligence which makes the bailee responsible for loss of or injury to the thing bailed. There are, therefore, three degrees of negligence. The absence of slight care constitutes gross negligence ; the absence of ordinary care constitutes ordinary negligence ; the absence of great care constitutes slight negligence. The general purpose of the Law of Bailment is to ascertain whenever loss of or injury to a thing bailed occurs, to what degree of care the bailee was bound, and of what degree of negligence he has been guilty.

For this purpose bailees are sometimes distributed into three general classes, corresponding with the three degrees of care and negligence already referred to. The *first* of these is, where the bailment is for the benefit of the bailor alone. In

of his principles from the civil law. And he gave at once a proof of the wisdom of that law, and of his own sagacity in seizing those of its principles which had been adopted by or were applicable to the common law, and in

stating them with great accuracy of definition, and with the modifications required to adapt them to the common law. So that they have passed through all subsequent adjudications with but little essential change.

this class but slight care is required of the bailee, and he is responsible only for gross negligence. The *second* is, where *the bailment is for the benefit of the bailee alone. In this class the geatest care is required of the bailee, and he is responsible for slight negligence. The *third* is, where the bailment is for the benefit both of bailor and bailee. In this class, ordinary care is required of the bailee, and he is responsible for ordinary negligence. We shall also see, presently, that there are bailees of whom the utmost possible care is required, and who are responsible for the slightest possible negligence, and others who are responsible when guilty of no negligence whatever.

Courts and writers have sometimes spoken of gross negligence as the same thing as fraud; but this is inaccurate. (q) There are bailees who should not be held responsible but for the grossest negligence, and it is often difficult to distinguish between such cases and those where there is reasonable suspicion of fraud; for such negligence generally justifies such suspicion. But that the law makes this distinction is certain.

There have been many different classifications of the kinds of bailments; (r) but we prefer and shall use that of Sir

(q) In the case *In re Hall & Hinds*, 2 M. & Gr. 852, Tindal, C. J., says:—“*Lata culpa* or *crassa negligentia*, both by the civil law and our own, approximates to, and in many instances cannot be distinguished from *dolus malus* or misconduct.” There may be instances in which these cannot be discriminated in *fact*, but they are entirely distinct in *law*. In *Wilson v. Y. & M. Rail Road Co.* 11 Gill & Johns. 58, 79, the court say:—“We do not think that gross negligence would in construction of law amount to fraud, but was only evidence to be left to the jury, from which they might infer fraud, or the want of *bona fides*.” In *Goodman v. Harvey*, 4 Ad. & El. 876, Lord Denman says:—“Gross negligence may be evidence of *mala fides*, but it is not the same thing.” This is quoted with approbation in *Jones v. Smith*, 1 Hare, 71, and Vice-Chancellor Wigram adds:—“The doctrines of law and equity upon this point ought to be concurrent.” When Lord Holt, in *Coggs v. Bernard*, says that

gross negligence is looked upon as evidence of fraud, he adopts a rule of the civil law; he does not mean that this evidence is conclusive; or, that if it be rebutted, and the negligence cleared from all stain of actual fraud, it will not remain gross negligence. In other words, gross negligence is not fraud by inference of law, but may go to a jury as evidence of fraud.

(r) There are two classifications of the various kinds of bailments which have become very celebrated in the English and American law—that of Lord Holt, in the case of *Coggs v. Bernard*, *supra*, and that of Sir William Jones, in his essay on bailments. We shall give them both in their authors' own language. Lord Holt's is as follows:—“There are,” says he, “six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in Southcote's

William Jones, which varies somewhat from Lord *Holt's*. And we shall speak successively of

First, *DEPOSITUM*, or deposit without compensation or reward.

Second, *MANDATUM*, or gratuitous commission, wherein the mandatary agrees to do something with or about the thing bailed.

Third, *COMMODATUM*, or loan, where the thing bailed is lent for use, without pay, and is to be itself returned.

Fourth, *PIGNUS*, or pledge, where the thing bailed is security for debt.

Fifth, *LOCATIO*, or hiring, for a reward or compensation.

SECTION I.

DEPOSITUM.

Where a thing is placed with a depositary, to be kept for a time, and returned when called for, the depositary to have no

case. The second sort is, when goods or chattels that are useful are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored *in specie*. The third sort is when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadum*, and in English a *pawn* or *pledge*. The fifth sort is when goods or chattels are delivered to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them or do something about them *gratis*, without any reward for such his work or carriage." Upon this classification, Sir William Jones has made the following observations:—"His division of bailments into six sorts appears, in the first

place, a little inaccurate; for, in truth, his *fifth* sort is no more than a branch of his *third*, and he might, with equal reason, have added a *seventh*, since the *fifth* is capable of another subdivision. I acknowledge, therefore, but *five* species of bailments, which I shall now enumerate and define, with all the *Latin* names, one or two of which Lord *Holt* has omitted. 1. *DEPOSITUM*, which is a naked bailment, without reward, of goods, to be *kept* for the bailor. 2. *MANDATUM*, or *commission*, when the mandatary undertakes, without recompense, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir *Henry Finch* divides bailment into *two* sorts, to *keep*, and to *employ*. 3. *COMMODATUM*, or *loan for use*; when goods are bailed, without pay, to be *used* for a certain time by the bailee. 4. *PIGNORI ACCEP-TUM*, when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. *LOCATUM*, or *hiring*, which is always for a *reward*; and this bailment is either, 1. *Locatio rei*, by which the hirer gains the temporary use of *the thing*; or, 2. *Locatio operis faciendi*, when *work* and *la-*

compensation, the benefit of the transaction is wholly on the side of the bailor, and the bailee is liable only for gross negligence. (s) By the Roman law he was answerable only for

bor, or *care* and *pains*, are to be performed or bestowed on the thing delivered; or, 3. *Locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place, either to a public carrier, or to a private person." See Jones on Bail. 35.

(s) This has been the clearly established law ever since the case of *Coggs v. Bernard*. Lord *Coke*, however, in Southcote's case, 4 Co. Rep. 83 b, and in Co. Litt. 89 a, laid down a different rule. He stated the law to be that a gratuitous bailee must answer for the goods delivered to him at his peril, unless he has made a special agreement to take such care of them only as he takes of his own goods; "for to be kept and to be safely kept is all one in law." But the profession seem never to have been satisfied with Lord *Coke's* rule. For it was denied to be law in 33 Car. 2, by *Pemberton*, C. J., in the case of *Rex v. Hertford*, 2 Show. 172; and again in 13 Will. 3, by *Holt*, C. J., in the case of *Lane v. Cotton*, 12 Mod. 472, 487; and finally it was expressly overruled by the whole Court of Queen's Bench, in 2 Ann, in the case of *Coggs v. Bernard*. And *Holt*, C. J., in the latter case, said that the rule stated in the text had always been acted upon at Guildhall, contrary to the opinion of Lord *Coke*, particularly during all of Chief Justice *Pemberton's* time, and ever since. The whole matter of the liability of a depositary was much discussed in the case of *Foster v. The Essex Bank*, 17 Mass. 479. The facts in that case were that the plaintiff's testator had deposited at the Essex Bank, for safe keeping, a chest containing a large quantity of gold. Sometime after the deposit was made, the gold was taken from the chest and put in a cask, from whence the greater part of it was fraudulently and secretly taken by the cashier and chief clerk, who appropriated it to their own use, and afterwards absconded, having also defrauded the bank of the greater part of its capital. This was done without the knowledge of any of the directors, or members of the corporation. The deposit in question was kept in the vault, in the same manner, and with the same care, as other spe-

cial deposits, and as the specie of the bank; and the cashier and the clerk sustained fair reputations, until the time of their absconding. The court held that the bank was not liable. And *Parker*, C. J., said:—"The dictum of Lord *Coke*, that the bare acceptance of goods to keep implies a promise to keep them safely, so that the depositary will be liable for loss by stealth or accident, is entirely exploded; and Sir W. Jones insists that such a harsh principle cannot be inferred from Southcote's case, on which Lord *Coke* relied; the judgment in that case, as the modern civilian thinks, being founded upon the particular state of the pleadings from which it might be inferred, either that there was a special contract to keep safely, or gross negligence in the depositary. But as the judges, *Gawdy* and *Clench*, who alone decided that cause, said that the plaintiff ought to recover, because it was not a special bailment, by which the defendant accepted to keep them as his own proper goods, and not otherwise; the inference which Lord *Coke* drew from the decision, that a promise to keep implied a promise to keep safely, even at the peril of thieves, was by no means unwarranted. But the decision, as well as the dictum of Lord *Coke* in his commentary, were fully and explicitly overruled by all the judges in the case of *Coggs v. Bernard*, and upon the most sound principles. It is so considered in *Hargrave* and *Butler's* note to Co. Litt. n. 78, and all the cases since have adopted the principle, that a mere depositary, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence; which, as is everywhere observed, bears so near a resemblance to fraud, as to be equivalent to it in its effect upon contracts. Indeed the old doctrine, as stated in Southcote's case, and by Lord *Coke*, has been so entirely reversed by the more modern decisions, that, instead of a presumption arising from a mere bailment, that the party undertook to keep safely, and was therefore chargeable, unless he proved a special agreement to keep only as he would his own; the bailor, if he would recover, must, in addition to the

fraud; for if the bailor thus deposited goods with a negligent person, he took upon himself the risk of negligence. So it seems to have been held by Bracton, (*t*) who copied from the Roman law. But by the English and American law, such bailee is, as we have seen, liable for gross negligence, although he may have been wholly innocent of any fraudulent intent. It is impossible to lay down any rule or principle, which will be in all cases a reliable test as to what constitutes gross negligence. The question must always depend upon several circumstances; such as the nature and quality of the goods bailed, and the character and customs of the place where the trust is to be executed. What would amount to more than ordinary diligence in the case of a chattel of great bulk and little value, might be very gross negligence in the case of a bag of gold coin, or a parcel of valuable papers. Again, what would be a sufficient degree of diligence in a thinly peopled country, might be very culpable negligence in a thickly inhabited city. (*u*) It has been very commonly stated by writers, and is said in some cases, that a depositary is not liable, as for gross negligence, if he shows that he has taken as much care of the goods of the bailor as he has of his own; but this is not law, (*uu*) and although it

mere bailment alleged and proved, prove a special undertaking to keep the goods safely; and even then, according to Sir William Jones, the depositary is liable only in case of ordinary neglect, which is such as would not be suffered by men of common prudence and discretion; so that if goods deposited with one who engaged to keep them safely were stolen, without the fault of the bailee, he having taken all reasonable precautions to render them safe, the loss would fall upon the owner, and not the bailee."

(*t*) Lib. 3, ch. 2, fol. 99, b.

(*u*) It was held in the case of *Doorman v. Jenkins*, 2 Ad. & El. 256, after much consideration, that the question of gross negligence was rather a question of fact for the jury than of law for the court. But this does not remove all difficulty from the question, what constitutes gross negligence. For it is obvious that the jury should receive instructions from the court to guide them in forming their judgment.

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(*uu*) It seems very clear that this is not a reliable test. For we have already seen that a depositary is liable for gross negligence, though a jury may be satisfied that he is wholly innocent of any fraudulent intent; and it is obvious that persons even who usually exercise great care, may in some instances be guilty of very gross negligence in the management of their own affairs. It seems also to be equally clear upon the *modern authorities* that it is no defence for a depositary who has by his negligence lost the goods intrusted to him, that he has been equally negligent in regard to his own property. The first case that we have seen going to this point is that of *Rooth v. Wilson*, 1 B. & Ald. 59. That was an action on the case against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a certain horse of the plaintiff, feeding in the plaintiff's close, through the defects and insufficiencies of the fences, fell into the defendant's close and was killed. The defendant pleaded

has been thought that the degree of care and diligence to be required of a bailee should be regulated to some extent

the general issue, and on the trial it appeared that the horse was the property of the plaintiff's brother, who sent it to him on the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it after dark into his close, where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from one to the other. The jury having found a verdict for the plaintiff, a rule for setting aside the verdict and granting a new trial was obtained, in support of which it was contended, among other things, that the plaintiff could not maintain the action, because, having taken as much care of the horse as he did of his own cattle, he was not liable over, and so had not sustained any damage. But Lord *Ellenborough* said:—"The plaintiff certainly was a gratuitous bailee, but, as such, he owes it to the owner of the horse not to put it into a dangerous pasture; and if he did not exercise a proper degree of care, he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused, after dark. That is a degree of negligence sufficient to render him liable." The other judges being of the same opinion, the rule was discharged. Afterwards came the case of *Doorman v. Jenkins*, 2 Ad. & El. 256. The plaintiff, in that case, had intrusted the defendant with a sum of money for the purpose of paying and taking up a bill of exchange. It appeared that the defendant, who was the proprietor of a coffee-house, had placed the money in his cash-box, which was kept in the tap-room; that the tap-room had a bar in it; that it was open on *Sunday*, but that the other parts of the premises, which were inhabited by the defendant and his family, were not open on that day; and that the cash-box, with the plaintiff's money in it, and also a much larger sum belonging to the defendant, was stolen from the tap-room on a *Sunday*. The defendant's counsel contended that there was no case to go to the jury, inasmuch as the defendant, being a gratuitous bailee, was liable only for gross negligence; and the loss

of his own money, at the same time with the plaintiff's, showed that the loss had not happened for want of such care as he would take of his own property. But Lord *Denman*, before whom the case was tried, refused to nonsuit the plaintiff, and told the jury that it did not follow from the defendant's having lost his own money at the same time with the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence. The jury having found a verdict for the plaintiff, a rule was obtained to set it aside. The counsel for the defendant, one of whom was Sir J. Scarlett, in support of the rule, said that they did not contend for the absolute proposition, that a gratuitous bailee, who keeps another person's goods as carefully as his own, cannot become liable for the loss, or be guilty of gross negligence. Their objection to the verdict was, that the plaintiff, upon whom the burden of proof lay, did not make out a *prima facie* case of gross negligence. But the court unanimously discharged the rule. And Mr. Justice *Taunton* said:—"The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own, (which I think perfectly immaterial,) into the till of a public house." The case of *Tracy v. Wood*, 3 Mason, 132, is also a very strong case to the same point. It was an action of assumpsit for negligence in losing 764½ doubloons, intrusted to the defendant to be carried from New York to Boston, as a gratuitous bailee. The gold was put up in two distinct bags, one within the other, and at the trial, upon the general issue, it appeared that the defendant, a money broker, brought them on board of the steamboat bound from New York to Providence; that in the morning while the steamboat lay at New York, and a short time before sailing, one bag was discovered to be lost, and the other was left by the defendant on a table in his valise in the cabin, for a few moments only, while he went on deck to send information of the supposed loss to the

by what may be shown to be his general character in those respects, it would seem to be the better opinion that

plaintiffs, there being then a large number of passengers on board, and the loss being publicly known among them. On the defendant's return the second bag was also missing, and after every search no trace of the manner of the loss could be ascertained. The valise containing both bags was brought on board by the defendant on the preceding evening, and put by him in a berth in the forward cabin. He left it there all night, having gone in the evening to the theatre, and on his return having slept in the middle cabin. The defendant had his own money to a considerable amount in the same valise. There was evidence to show that he made inquiries on board, if the valise would be safe, and that he was informed that if it contained articles of value, it had better be put into the custody of the captain's clerk in the bar, under lock and key. *Story, J.*, in summing up to the jury, said:—"I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible, unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him, as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case if the plaintiffs had known him to be a very careless or a very attentive man. The language of the books as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said that gross negligence is equivalent to fraud, it is not meant that

it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. In determining what is gross negligence, we must take into consideration what is the nature of the thing bailed. If it be of little value, less care is required than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. . . . It appears to me that the true way of considering cases of this nature is, to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care which men of common sense, however inattentive, usually take or ought to be presumed to take, of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence. The present is a case of a mandatory of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own

the individual character of the bailee is not a legitimate subject of inquiry, unless it can be shown that his character was known to the bailor, and that it was the implied understanding of the parties that the bailee should employ such care and skill as he possessed. (v)

Sir William Jones thinks the depositary holden for less than gross negligence, first, where he makes a special bargain for special care, and secondly, where he spontaneously and officiously proposes to keep the goods of another. (w) But this last has not been determined by adjudication.

The depositary is bound to deliver the thing as it was, and with it all its increase or profit. But if the bailor was not the rightful owner, and the depositary delivers the thing to the rightful owner on demand from him, this constitutes a good defence against the bailor; (x) although, for his own

money in the same valise; and took no better care of it than of the plaintiff's. Still, if the jury are of opinion that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence."

(v) *The William*, 6 Rob. Adm. 316. In this case a vessel had been captured, and was afterwards lost while in the hands of the captor. The capture was justifiable, and the question was whether the captor had used such diligence as a captor is required to use in such cases. Sir W. Scott, in addressing the jury, said:—"When a capture is not justifiable, the captor is answerable for every damage. But in this case the original seizure has been justified by the condemnation of part of the cargo. It is therefore to be considered as a justifiable seizure, in which all that the law requires of the captor is, that he should be held responsible for *due diligence*. But on questions of this kind there is one position sometimes advanced, which does not meet with my entire assent, namely, that captors are answerable only for *such care* as they would take of their own property. This I think is not a just criterion in such case; for a man may, with respect to

his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable, in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion." "Certainly it might," says Mr. Justice Story, "if such character was known, and the party under the circumstances might be presumed to rely, not on the rule of law, but on the care which the party was accustomed to take of his own property, in making the deposit. But, unless he knew the habits of the bailee, or could be fairly presumed to trust to such care as the bailee might use about his own property of a like nature, there is no ground to say that he has waived his right to demand reasonable diligence. Why should not the rule of the civil law be applied to such a case? *Latae culpæ finis est, non intelligere id quod omnes intelligunt.*" Story on Bailm. § 67. See the case of *Wilson v. Brett*, 11 M. & W. 113.

(w) Jones on Bailments, 48.

(x) *King v. Richards*, 6 Whart. 418.

security, he should, if possible, compel the rival claimants to interplead. (*y*)

If the property belongs to two or more bailors, and is capable of partition, he may on demand restore it by division *among them. But where it is incapable of division the law seems to be deficient. The ancient action of detinue, with the process of garnishment, would have settled the claim. Kent (*z*) thinks equity interpleader adequate, and far better; as it certainly would be if it could be applied to the question; but this Story (*a*) confines to cases of a privity between the parties, as where there was a joint bailment, or joint contract. Upon the whole we prefer Kent's opinion.

The duty of the depositary as to the place of delivery has been much questioned. But it may be considered as settled in this country, that a bailee, bound to deliver goods on demand, discharges his obligation by delivering or tendering them where they are, or at his own residence or place of business; (*b*) but the demand may be made on him elsewhere. (*c*)

It is sometimes said that a depositary has a special property in the deposit; but this is perhaps inaccurate. (*d*) He has the right of possession, but not the right of property; and may therefore maintain trover, for which possession is enough; (*e*) but not replevin, because that action requires property in the plaintiff. (*f*)

(*y*) Rich v. Aldred, 6 Mod. 216.

(*z*) 2 Kent's Com. 567.

(*a*) Story on Bailments, § 112.

(*b*) Scott v. Crane, 1 Conn. 255; Slingerland v. Morse, 8 Johns. 474.

(*c*) Higgins v. Emmons, 5 Conn. 76. Dunlap v. Hunting, 2 Denio, 643.

(*d*) Hartop v. Hoare, 3 Atk. 44; Story on Bailments, § 93, *et seq.*

(*e*) Sutton v. Buck, 2 Taunt. 302; Burton v. Hughes, 2 Bing. 173. See also Webb v. Fox, 7 T. R. 391; Giles v. Grover, 6 Bligh, 277.

(*f*) At least such is the law in Massachusetts. Waterman v. Robinson, 5 Mass. 303. That was an action of replevin. It appeared that the goods replevied, on the 20th of July, 1801, be-

longed to one Lucas, on which day a commission of bankruptcy issued against the said Lucas, and he being declared a bankrupt, by a warrant from the commissioners, their messenger seized the goods in question, caused them to be appraised and inventoried, and on the 28th day of the same July delivered them to the plaintiff, taking his obligation to redeliver them on demand. While the goods were so in the custody of the plaintiff, the defendant, as deputy sheriff, attached them as the property of Lucas. Upon these facts the court held that the plaintiff could not recover. Parsons, C. J., said:—"Upon these facts we are to decide whether the property of the goods, so that

One cannot be made a depositary against his will. (g) He must consent; but the consent may be implied or inferred. A pledgee, holding a pledge over after payment of the debt, is a depositary. One finding property need not take charge of it; if he chooses to do so he becomes a depositary,

he might lawfully replevy them, was in the plaintiff. Trover may be maintained by him who has the possession; but replevin cannot be maintained but by him who has the property, either general or special. Admitting the commission, and the proceedings under it, to be regular, what property had the plaintiff in the goods? The general property was in the commissioners until the assignment, and then in the assignee. The messenger, if any person, had the special property, and not the plaintiff, who had no interest in the goods, but merely had the care of them for safe keeping. If his possession was violated, he might maintain trespass or trover, but he had no special property, by which he could maintain replevin; in which the question is not of possession, but of property, although possession may be *prima facie* evidence of property. On this ground we are of opinion that the plaintiff cannot maintain this action, he not proving that either the general or special property was in himself." So in the case of *Templeman v. Case*, 10 Mod. 24, it is said that a *possessory* right is sufficient to maintain an action of *trespass* or *case*, though not a *replevin*. In New York, on the other hand, it is held that replevin will lie in favor of a depositary. See the case of *Miller v. Adsit*, 16 Wend. 335. And the court seem to have entertained a similar opinion in 21 H. 7, 14 b, pl. 23. That case was as follows:—"In replevin. The defendant said that the property, &c., was in a stranger. The plaintiff said that the stranger delivered them to him to be redelivered, and before any redelivery the defendant took them. Marow said that he would demur upon that plea. For he said it was adjudged in a book, that if one has beasts for a term of years, or to manure his land, there he shall have replevin. And the reason is, *he has a good property for the time against the lessor, and shall have an action against him if he retakes them*. But where he cannot have an action against the lessor, it

seems that he shall not have replevin. And here there is only a delivery to redeliver to the bailor, so that he has not any property. For if one takes them out of the possession of the bailee, the bailor shall have an action of trespass, and if he recovers by this, the bailee shall never have an action for the taking. Wherefore, &c. *Fineux, C. J.* This is not a new case. For a case similar to this has been several times adjudged in our books; as in the case of letting beasts for a term of years, and to manure land, &c. And in the case here *the bailee has a property against every stranger, for he is chargeable to the bailor*. And therefore it is reasonable that he should recover against any stranger who takes them out of his possession. Therefore, when the plaintiff has had conveyed to him such special property, it seems that it is good in maintenance of his action. Marow then prayed further time, and said that as he was then advised, he would demur upon the plea. *Fineux, C. J.* And you will not be so well advised to demur upon this plea; but we shall be as well advised to give judgment against you."

(g) *Lethbridge v. Phillips*, 2 Stark. 544. It appeared in this case that a person of the name of Bernard, being desirous, for particular reasons of his own, that the defendant should see a picture belonging to the plaintiff, borrowed the picture of the plaintiff for the purpose of sending it to the defendant, and afterwards delivered it to a son of the defendant to be taken to the defendant's house. The defendant's son accordingly took it home, and the picture was, whilst at the defendant's, much damaged in consequence of having been placed on a mantel-piece near a stove. It appeared that the picture had been sent by Bernard to the defendant without any request on the part of the latter, and without any previous communication between them on the subject. Upon these facts *Abbott, C. J.*, was of opinion that the action could not be supported; that the defendant could not,

and is liable for loss from gross negligence, (*h*) and may *charge the owner for necessary expense and labor in the care of it. (*i*) And perhaps his consent may be absolutely implied when the property is forced into his care by extraordinary exigences, as by fire or shipwreck.

SECTION II.

MANDATUM.

When the commission is gratuitous, there also the transaction is for the exclusive benefit of the bailor, and the bailee is held only for gross negligence. In deposit the safe-keeping is the principal matter; in mandate, the work to be done

without his knowledge and consent, be considered as a bailee of the property. In some instances, he said, it had happened that property of much greater value than that in the present case had been left at gentlemen's houses by mistake, and in such cases the parties could not be considered as bailees of the property without their consent.

(*h*) "When a man doth find goods," says Lord Coke, "it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 Ed. 4, 13, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them; for at the first it is in his election whether he will take them or not into his custody, but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely. A man, therefore, which finds goods, if he be wise, will then search out the right owner of them, and so deliver them unto him. If the owner comes unto him and demands them, and he answers him that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them; this refusal is no conversion, if he do keep them for him." *Isaac v. Clark*, 2 Bulst. 306, 312. The finder of property, for which a specific reward has been offered, has a

lien upon it for the payment of the amount of the reward. *Wentworth v. Day*, 3 Met. 352. It is otherwise if the offer be merely of "a liberal reward." *Wilson v. Guyton*, 8 Gill, 213. — If a person finds property, which another has cast away and abandoned as entirely worthless, he may hold it against the original owner. *McGoon v. Ankeny*, 11 Ill. 558.

(*i*) So said in *Story on Bailments*, § 121 a, but it seems never to have been expressly adjudged. The case which comes nearest to it is that of *Nicholson v. Chapman*, 2 H. Bl. 254. In this case a quantity of timber belonging to the plaintiff was placed in a dock on the bank of a navigable river, and being accidentally loosened, was carried by the tide to a considerable distance, and left at low water upon a towing path. The defendant, finding it in that situation, voluntarily conveyed it to a place of safety, beyond the reach of the tide at high water; and when the plaintiff afterwards sent to demand the timber to be restored to him, the defendant refused to restore it without payment for his trouble and expense. The plaintiff thereupon brought an action of trover; and the court held that the defendant had no lien upon the timber, and that the action was maintainable. Lord Chief Justice *Eyre*, however, intimated, in the course of his judgment, that the defendant might recover for his trouble and expense in some form

with or about the thing. Hence the first is said to lie in custody, the second in feaseance.

The cases are not very numerous, either as to deposit or mandate. Perhaps because both are gratuitous; and it is not often that persons undertake to do any thing of importance for another without compensation.

The name *mandatum* was first used in England by Bracton, who borrowed it from the civil law; afterwards the word commission was commonly used; but in recent times this is generally applied to dealings with factors, brokers, &c., for compensation, or to the compensation itself; and Sir Wm. Jones returned to Bracton's word, which has since been generally used.

It is an important and difficult question, what is the *ground* of the obligation of any party, who undertakes *gratuitously* to do any thing in relation to any goods. Sir William Jones says he is bound to do, and is responsible for not doing. (j) But an examination of the cases would lead to a distinction not always regarded. If one has property intrusted to him, in order that he may do something in or about or with that property, if he accepts the property and the trust, this is a contract on a consideration; and he is liable in an action *ex contractu* for any failure in the discharge of his obligation. But if one be requested to do something in relation to certain property, which is not put

of action. After declaring that the common law gave the defendant no lien in such a case, and that this case could not be likened to a case of salvage, he said: "It is, therefore, a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment." The learned reporter, in a note to this passage, says, "It seems probable, that in such a case, if any action could be maintained, it would be an action of *assumpsit* for work and labor, in which the

court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompense would come properly before the jury." See *Baker v. Hoag*, 3 Barb. 113, 7 Id. 303. It might be found somewhat difficult, however, on technical grounds, to support such an action. See *Bartholomew v. Jackson*, 20 Johns. 28. See also *ante*, p. 371, n. (b.)

(j) Jones on Bailments, 56. He borrows this principle from the civil law. By that law he might accept or refuse a mandate; but having accepted, must perform. "*Liberum est, mandatum non suscipere. Si susceptum non impleverit, tenetur. Quod mandatum suscepit, tenetur, etsi non gessisset.*" *Balfie v. West*, 22 E. L. & E. 506.

into his possession, nor any consideration paid him, although he undertake to do what is requested, he is under no obligation; there is no contract, because no consideration. He is therefore not liable for not doing; but if he begins to do, that is, enters upon the execution of his agency, (for it is that rather than a mandate at common law,) and then fails to do what he undertakes to do, he is liable for malfeasance; but only in an action *ex delicto*, and not *ex contractu*. (*k*) The case of *Thorne v. Deas*, (*l*) in fact * rests upon this distinction, and is therefore properly decided; but it is treated as a case of mandate, and an elaborate examination of authorities leads the learned court to the rule that no mandatary is liable, unless he, in addition to his acceptance of the property and the trust, enters upon an execution of it, and then fails therein. This rule, as applicable to the mandatary properly so called, admits of much doubt, although we acknowledge that the question is encumbered with some difficulties.

It has indeed been very strenuously insisted upon in several instances, by able and learned writers, that mandates and deposits are not contracts; and that the liability of bailees of this class rests wholly upon the ground of tort. If this were to be taken as the true rule of law, it might occasion serious inconvenience. For it is doubtful whether gratuitous bailees could be made liable in tort in several cases to which it has generally been supposed that their liability extended. But we think there is no insuperable objection to considering mandates and deposits as contracts, and enforcing the obligations arising out of them by the action of *assumpsit*. It is obvious that the only objection to so considering them is the alleged want of a sufficient consideration. But we regard it as well settled by the authorities, that the delivery and acceptance of the goods constitute a sufficient consideration. (*m*) Nor do we regard it as an unreasonable doctrine

(*k*) *Wilkinson v. Coverdale*, 1 Esp. 74; *French v. Reed*, 6 Binney, 308; *Seller v. Work*, 1 Marsh. on Insurance, 299.

(*l*) 4 Johns. 84. See *infra*, p. 586, n. (*o*.)

(*m*) This was adjudged for the first time, we believe, in the King's Bench, in 44 Eliz. in the case of *Riches v. Briggess*, Yelv. 4, Cro. Eliz. 883. In that case the plaintiff declared that in consideration he had delivered to the

upon principle. It is true that the bailee does not ordinarily derive any benefit from such a transaction; but this is not

defendant twenty quarters of wheat, the defendant promised upon request to deliver the same wheat again to the plaintiff. And this was adjudged, on a motion in arrest of judgment, to be a good consideration. But the case is said to have been afterwards reversed in the Exchequer Chamber. The same point arose again in 2 Jac., in the case of *Game v. Harvie*, Yelv. 50, and in 6 Jac. in the case of *Pickas v. Guile*, Yelv. 128. In both of these cases, the Court of King's Bench followed the decision of the Exchequer Chamber, reversing *Riches v. Briggs*, but at the same time said that that case was erroneously reversed. Afterwards, in 21 Jac., the same point arose again in the case of *Wheatley v. Low*, Cro. Jac. 668. In this case the plaintiff declared that whereas he was obliged to J. S. in forty pounds for the payment of twenty pounds; and the bond being forfeited, he delivered ten pounds to the defendant, to the intent he should pay it to J. S. in part of payment *sine ulla mora*; that in consideration thereof the defendant assumed, &c. The defendant pleaded *non-assumpsit*, and a verdict having been found for the plaintiff, it was moved in arrest of judgment that this was not any consideration, because it was not alleged that he delivered it to the defendant upon his request; and the acceptance of it to deliver to another *sine mora* could not be any benefit to the defendant to charge him with this promise. *Sed non allocatur*; for, since he accepted this money to deliver, and promised to deliver it, it was a good consideration to charge him. This judgment was affirmed in the Exchequer Chamber on a writ of error. This case was sanctioned to the fullest extent by Lord *Holt*, in *Coggs v. Bernard*. He there says:—"There has been a question made, If I deliver goods to A., and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and, according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of

that judgment in Yelv. 4, was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21, Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration, in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession." *Wheatley v. Low*, has always been considered as good law from that time to this. We are not aware that any adjudged case has cast any doubt upon it, at least so far as the point in question is concerned. On the other hand, there are numerous cases in which *assumpsit* has been sustained on no other consideration than what existed in that case. Thus, in the case of *Shiells*, assignee of *Goodwin*, v. *Blackburne*, 1 H. Bl. 158, the defendant, who was a general merchant in London, having received orders from his correspondent in *Madeira* to send thither a quantity of leather cut out for shoes and boots, employed *Goodwin*, the bankrupt, who was a shoemaker, to execute the order. *Goodwin* accordingly prepared the leather for the defendant, and at the same time prepared another parcel of the same kind of leather on his own account, which he packed in a separate case, to be sent to *Madeira* on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels; and he, to save the expense and trouble of a double entry at the custom-house, voluntarily and without any compensation, by agreement with *Goodwin*, made one entry of both the cases, but did it under the denomination of *wrought leather*, instead of *dressed leather*, which it ought to have been. In consequence of this mistake, both cases were seized, and this action was brought by the assignees of *Goodwin*, to recover the value of the leather which he had prepared on his own ac-

necessary in order to constitute a good consideration. It is sufficient, if an injury accrues or may accrue to the bailor, or if he parts with a present right. That such is the case, it would seem that there could be no doubt. He intrusts his goods to the bailee, and thereby renders them liable to be lost or injured. He parts with his present control over them,

count. The first count in the declaration stated that the bankrupt before his bankruptcy was possessed of a quantity of leather, which he designed to export to the island of Madeira, for which purpose it was necessary that a proper entry of it should be made at the custom-house; that the defendant, in consideration that the bankrupt would permit him to enter the said leather at the custom-house, undertook to enter it under a right denomination; that the bankrupt confiding in the undertaking of the defendant, did permit him to enter it at the custom-house for exportation; that the defendant did not enter it under a right denomination, but, on the contrary, made an entry of it under a wrong denomination, by means whereof, &c. If there can be any possible doubt whether this count is wholly in assumpsit, it may be observed that it was joined with a count for goods sold and delivered, and a count on a *quantum meruit*. In the case of *Whitehead v. Greetham, McClell. & Y.* 205, in the Exchequer Chamber, the declaration stated that whereas the plaintiff, at the special instance and request of the defendant, retained and employed the defendant to lay out a certain sum of money for the plaintiff, in the purchase of an annuity, to be well and sufficiently secured, he the said defendant undertook to use due and sufficient care to lay out the said sum of money in the purchase of an annuity, the payment whereof should be well and sufficiently secured; and the said plaintiff in fact saith, &c. Judgment having been given for the plaintiff in the King's Bench, a writ of error was brought, and the error relied on was, that no sufficient consideration appeared on the face of the declaration. The ground relied on, however, by Tindal, for the plaintiff in error, was, not that the intrusting the defendant with the money was not a sufficient consideration, but that it did not sufficiently ap-

pear from the declaration that that was the consideration of the defendant's promise. He said:—"It was essential to the establishment of his case that the moving cause of the defendant's promise was the plaintiff's having intrusted him with this money to lay out, and there is nothing in the count in question to show that." *Sed non allocatur*, for per *Best, C. J.*, delivering the judgment of the court:—"The count has averred that the plaintiff, at the defendant's request, retained the defendant to lay out a sum of money in the purchase of an annuity, and delivered him £700 for that purpose; and that the defendant undertook, and faithfully promised the plaintiff, to use due and sufficient care to advance and lay out that money in the purchase of an annuity, the payment whereof should be well and sufficiently secured. *Coggs v. Bernard* decides that the mere delivery of the article is abundant consideration. There the consideration was the delivery of brandy. The same consideration exists here, because money was delivered. It is said it does not appear that the delivery was the consideration of the defendant's promise. But the money was delivered by the plaintiff's hand to the defendant, which, in law, raises a responsibility in the defendant for its application; and when that fact is found by the jury, and that immediately after a promise was made by the defendant to the plaintiff, must it not be taken that the promise was in consideration of the delivery?" The case of *Doorman v. Jenkins*, 2 Ad. & El. 256, is equally in point. That was an action of assumpsit, and the declaration was very similar to those that we have already considered, and no objection taken to it. See also *Shillibeer v. Glyn*, 2 M. & W. 143; *Rutgers v. Lucet*, 2 Johns. Cas. 92; *Robinson v. Threadgill*, 13 Ired. 39. And see *Ante*, p. 372.

and perhaps renders himself unable to give the trust to any one else, or to execute it himself.

But although it thus appears that gratuitous bailees may be made liable *ex contractu*, if they have not performed their contract, it is obvious that they may also be made liable *ex delicto*, if they have committed a tort upon the property intrusted to them. And it is in reference to their liability *ex delicto* that the distinction, which has occasioned so much discussion in our books, between nonfeasance and misfeasance, becomes important. It seems sometimes to have been supposed that this distinction * has reference to their liability *ex contractu*; that a mandatary does not incur any obligation *ex contractu* until he enters upon the execution of his trust, but that he does incur such obligation when he enters upon the trust, and fails to go through with it or does it badly; and that if the mere delivery of the goods imposes such obligation, it is not on the ground that such delivery with the acceptance constitutes a good consideration, but on the ground that it amounts to a part execution of the trust. This, however, we must regard as erroneous.

It is very difficult to understand how a man can become liable *ex contractu* for not completing a work which he has begun, when he was under no legal obligation to begin it. But when we consider the distinction between nonfeasance and misfeasance in reference to liability in tort, it becomes very intelligible. (n) The common law looks upon an injury which

(n) The position which we have endeavored to maintain, that the distinction between *misfeasance* and *nonfeasance* has exclusive reference to liability sounding in tort, is fully supported by the case of *Benden v. Manning*, 2 New Hamp. 289. It was an action of *assumpsit* against a tailor for making a coat in an unskilful and improper manner, which he had contracted to make in a skilful and proper manner. The consideration for the promise laid in the declaration was a certain sum of money in that behalf paid. At the trial, the defendant objected that there was no evidence to prove the consideration so laid. The court instructed the jury

that the evidence, if believed, was sufficient to prove the consideration alleged, and the jury having returned a verdict for the plaintiff, the defendant filed a bill of exceptions, and brought a writ of error. And the court having decided that there was no evidence to prove the consideration alleged, the defendant in error contended that the action might be supported on the ground of a *misfeasance*. But *Richardson, C. J.*, said: "It has been contended on the part of the defendant in error that this action is brought to recover damages, not for a mere *nonfeasance*, but for a *misfeasance*, and therefore it was unnecessary to allege or prove a consideration. It is very

accrues from mere *nonfeasance* as too remote to lay the foundation for an action of tort; for this purpose it requires that the injury should be the direct and immediate consequence of the conduct complained of. (*o*)

A mandatary, as we have already intimated, is generally bound to exercise only slight diligence, and is responsible only for gross neglect. (*p*) The parties may, however, vary

clear that no man can be liable for the mere non-performance of a promise made without consideration; of course, when an action is brought to recover damages for the non-performance of a contract, a consideration must be alleged and proved. But when one man does another an injury, by unskillfully and improperly doing what he had promised to do, an action may be maintained to recover the damage although there was no consideration for the promise. The reason of this distinction is very obvious, but it is a distinction that cannot avail the defendant in error. His action was assumpsit, founded upon the breach of certain promises alleged to have been made upon certain considerations. The very gist of the action was the breach of a valid contract. But, if the promises were made without consideration, they were mere *nuda pacta*, and no action could be maintained upon them. And if the consideration alleged were not proved, the action was not supported. But if, instead of assumpsit, a special action upon the case had been brought for *misfeasance*, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the *misfeasance*, and it would have been wholly immaterial whether the contract was a valid one or not." See also *Elsee v. Gatward*, 5 T. R. 143, which substantially recognizes the same distinction. — If our positions are correct, it follows that in all cases of proper mandate, that is, where property is intrusted, the bailor *may* have two remedies for any injury done him by the bailee. He may have an action of assumpsit for a breach of contract on the part of the bailee; or if the conduct of the bailee amounts to an actionable tort, the bailor may waive the contract, and bring an action sounding in tort. On the other hand, in cases of mere gratuitous agency, where no property is intrusted, the

only remedy which the principal can have against the agent is by an action *ex delicto*. And if the agent has committed no act which amounts to an actionable tort, the principal is without remedy. It should be observed, however, that the delivery of a letter to be carried from place to place, or the delivery of a promissory note or bill of exchange for the purpose of collection would probably be held to be proper mandates, and the bailee in such cases would be held liable *ex contractu*. *Robinson v. Threadgill*, 13 Ire. L. 41. The liability of banks for due diligence in the collection of negotiable paper intrusted to them for that purpose, seems to rest upon this principle. See *Smedes v. The Bank of Utica*, 20 Johns. 372, 3 Cow. 662; *Bank of Utica v. McKinster*, 11 Wend. 473; *Mechanics Bank v. Merchants Bank*, 6 Met. 13. Chancellor *Kent* says: — "Receiving a letter to deliver, or money to pay, or a note by a bank to collect, and by negligence omitting to perform the trust, the mandatary, though acting gratuitously becomes responsible for damages resulting from his negligence. The delivery and receipt of the letter, money, or note, creates a sufficient consideration to support the contract, and is a part execution of it." See 2 *Kent*, Com. 571, n. a.

(*o*) See *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 30. The leading case on this point in this country is *Thorne v. Deas*, 4 Johns. 84, already referred to. In that case A. and B. being joint owners of a vessel, A. voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was afterwards lost. The court held that no action would lie against A. for the non-performance of this promise, though B. sustained a damage thereby. See also *Balfe v. West*, 22 E. L. & E. 506.

(*p*) The Roman law seems to have

the terms of the contract at their pleasure by a special agreement. So a mandatary may impose upon himself an

been different in this respect. By that law every mandatary seems to have been bound to bestow on the matter with which he was charged all the diligence and skill which the proper execution of it required. See *Story on Bailments*, § 173. Sir William Jones professed to follow the Roman law in this respect, but attempted to make a distinction between a mandate to carry and a mandate to perform a work, holding that the rule did not apply to the former, and that mandataries of that class were, like depositaries, liable only for gross negligence. *Essay on Bailments*, 52, 62. Mr. Justice *Story* is of opinion that there is no foundation for this distinction in the Roman law, and there certainly is none in our law. On the other hand, the rule is perfectly established with us that the same degree of diligence is required in cases of mandate, whether it be to carry or to perform a work, as in cases of deposit. This was very authoritatively declared in the case of *Shiells v. Blackburne*, 1 H. Bl. 158, the facts of which are stated *ante*, p. 583, n. (m.) Lord *Loughborough* there observed:—"I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries. But when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." See also to the same point *Stanton v. Bell*, 2 Hawks, 145; *Beardslee v. Richardson*, 11 Wend. 25. No definite rule can be laid down as to what will constitute gross negligence in each particular case. For this purpose, the nature and circumstances

of the case, and the terms of the contract, must be carefully attended to. In the case of *Fellowes v. Gordon*, 8 B. Monr. 415, the plaintiff, being indebted to the defendant and holding a note against the owners of a certain steamer, delivered the note which he so held to the defendant to be collected through a certain house at New Orleans, with which the defendant, who had a house at Louisville, was connected, the proceeds to be applied to the payment of the defendant's demand. When the note was delivered, the plaintiff informed the defendant that the solvency of the boat and owners was doubtful, and that the only probable means of saving the claim was to attach the boat at New Orleans on her first arrival there after the note became due, unless the note should be paid. The note was sent by the defendant to the house at New Orleans, by which it was presented, and payment demanded, on the first arrival of the boat at that city, but on payment of \$100, (one sixth only of the debt,) the boat was permitted to depart, and on her arrival at Nashville a short time afterwards, she was attached for other debts and sold, before the note was returned to the plaintiffs, for an amount not sufficient to pay the attaching creditors. The court held this to be a breach of duty for which the defendant was liable. And *Marshall, C. J.*, said:—"Regarding the houses at Louisville and New Orleans as merely gratuitous bailees, still having undertaken the commission, and proceeded in its execution, each was bound to proceed with reasonable care and diligence, according to the terms of the mandate. And a failure in the performance of this obligation was a breach of duty, for which, on well established principles, the delinquent party is liable in case of loss produced by his neglect. A bailee, receiving property under particular directions as to its disposition, impliedly undertakes to dispose of it according to those directions, and may be made liable for the loss consequent upon his failure or neglect to do so, and especially if he actually proceed with the business committed to him." On the other hand, in the case of *Whitney v. Lee*, 8 Met. 91, where a promissory note was delivered to the defendant, on

additional degree of liability by his interfering with the property committed to his charge, by which its custody is *rendered more insecure. (q) So it may be gathered from the cases, and from obvious reasons, that where the work to be done requires peculiar skill and care, and the mandatary undertakes it in such way as to be bound to go through with it, the want of the required skill and care would be negligence enough. (r) Indeed, it would be in that case gross

his voluntarily undertaking, without reward, "to secure and take care of it," it was *held*, that he was not bound to take any active measures to obtain security, but was simply bound to keep the note carefully and securely, and receive the money due thereon when offered. *Shaw, C. J.*, remarked:—"The term to 'secure' may be deemed ambiguous, meaning either to obtain security, or to keep securely; but associated with the words 'take care of,' and being a gratuitous undertaking, we do not understand that the defendant was to take active measures to obtain security, but simply to keep the note carefully and securely, and receive the money due thereon, when offered. This last authority and duty would seem to result from the custody of the note. . . . The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound; distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject-matter, and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other." See also *Mechanics & Traders Bank v. Gordon*, 5 Louis. Ann. 604.

(q) *Nelson v. Macintosh*, 1 Starkie, 237; *Bradish v. Henderson*, 1 Dane's Abr. 310.

(r) See the remarks of Lord *Loughborough*, in the case of *Shiells v. Blackburne*, quoted *ante*, p. 587, n. (p.) Mr. Justice *Heath* in the same case said:—"If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence,

if he undertook *gratis* to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable." But even a mandatary whose occupation implies peculiar skill, is not required to exercise the greatest amount of skill; if he exercises such skill as is usually exercised by members of his profession, it is sufficient. The law upon this subject is admirably stated by Mr. Justice *Porter*, in the case of *Percy v. Millaudon*, 20 Martin, 68, 75. His language was as follows:—"It is said by a writer of great authority, [Pothier,] who treats of the doctrine of mandate, that the mandatary cannot excuse himself by alleging a want of ability to discharge the trust undertaken. That it will not be sufficient for him to say he acted to the best of his ability, because he should have formed a more just estimate of his own capacity before he engaged himself. That, if he had not agreed to become the agent, the principal could have found some other person willing and capable of transacting the business correctly. This doctrine, if sound, would make the attorney in fact responsible for every error in judgment, no matter what care and attention he exercised in forming his opinion. It would make him liable to the principal in all doubtful cases, where the wisdom or legality of one or more alternatives was presented for his consideration, no matter how difficult the subject was. And if the embarrassment, in the choice of measures, grew out of a legal difficulty, it would require from him knowledge and learning, which the law only presumes in those who have made the jurisprudence of their country the study

negligence. But it might be otherwise, if the owner had no reason to believe that the mandatary possessed skill sufficient for the precise purpose for which he was employed; and certainly would be, if he had good reason to know that he had not the skill; as if he gave a valuable watch to be repaired, to one whom he knew to be not a watchmaker; or to one who, although a watchmaker, was known by him to be unaccustomed to watches of that kind. All these differences rest upon the ground of the presumed intention of the parties. And on the same principle, although the subject-matter of the mandate do not necessarily imply superior skill in the mandatary, still if he is known to possess superior skill he is bound to exercise it. (s)

of their lives, and which knowledge often fails in them from the intrinsic difficulty of the subject, and the fallibility of human judgment. It is no doubt true, that if the business to be transacted presupposes the exercise of a peculiar kind of knowledge, a person who would accept the office of mandatary, totally ignorant of the subject, could not excuse himself on the ground that he discharged his trust with fidelity and care. A lawyer who would undertake to perform the duties of a physician; a physician, who would become an agent to carry on a suit in a court of justice; a bricklayer, who would propose to repair a ship, or a landsman who would embark on board a vessel to navigate her, may be presented as examples to illustrate this distinction. But when the person who is appointed attorney in fact has the qualifications necessary for the discharge of the *ordinary duties* of the trust imposed, we are of opinion that on the occurrence of difficulties in the exercise of it, which offer only a choice of measures, the adoption of a course from which loss ensues cannot make the agent responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to us, to suppose the possession, and require the exercise of perfect wisdom in fallible beings. No man would undertake to render a service to another on such severe conditions. The reason given for the rule, namely, that if the mandatary had not accepted the office, a person capa-

ble of discharging the duty correctly would have been found, is quite unsatisfactory. The person who would have accepted, no matter who he might be, must have shared in common with him who did, the imperfection of our nature; and consequently must be presumed just as liable to have mistaken the correct course. The test of responsibility, therefore, should be, not the certainty of wisdom in others, but the possession of ordinary knowledge; and by showing that the error of the agent is of so gross a kind, that a man of common sense and ordinary attention would not have fallen into it. The rule which fixes responsibility, because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous."

(s) *Wilson v. Brett*, 11 M. & W. 113. This was an action on the case for negligence in riding the plaintiff's horse. The plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey race ground, where Mr. Margetson was engaged with others playing the game of cricket; and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with

SECTION III.

COMMODATUM.

Where a thing is borrowed, to be used by the borrower, without any reward or compensation to be received by the owner from him, this transaction resembles the two former, in so far as it is gratuitous. But it is unlike them, in that the benefit belongs exclusively to the bailee; and he is therefore bound to great care, and liable for slight negligence. (*ss*)

What constitutes this negligence, or, in general, what are the rules which belong to this species of bailment, we cannot ascertain to any great extent from adjudicated cases, as there are few or none which distinctly decide such questions. But in the case of *Coggs v. Bernard*, so often cited, Holt lays down certain principles, which he takes from Bracton, who borrows them from the civil law. Resting upon such

and skilled in horses. *Rolfe*, B., before whom the cause was tried, told the jury that, under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. And the Court of Exchequer held this instruction to be correct. *Parke*, B., said:—"I think the case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." *Alderson*, B. "The learned judge thought,

and correctly, that this defendant being shown to be a person of competent skill, there was no difference between his case and that of a borrower; because the only difference is, that there the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it." *Rolfe*, B. "The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence*—that it was the same thing, with the addition of a vituperative epithet." It does not distinctly appear by the report of this case whether the bailor knew that the bailee possessed superior skill or not. We think, however, it must be presumed that he did know it, or at least had reason to suppose that such was the case. See *ante*, p. 577, n. (v.)

(*ss*) *Phillips v. Condon*, 14 Ill. 84.

authority, and also upon manifest reason and justice, they may be deemed the rules of law on this subject; and we give them in a note below, in the words of Holt. (*t*)

* SECTION IV.

PIGNUS.

We now enter upon a topic of more interest, inasmuch as the questions which belong to it are of more frequent recurrence.

A pledge is a bailment for the mutual benefit of both parties, for while the pledgee obtains security for his debt, the pledgor obtains credit or delay, or other indulgence. The bailee is therefore bound only to ordinary care, and is liable only for ordinary neglect. If the pledge be lost by an intrinsic de-

(*t*) "As to the second sort of bailment, viz., *commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, fol. 99 a; his words are:—*Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuum accepit ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, substracta, vel abluta. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis*

adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illum incursu hostium vel prædonum vel naufragio amiserit, non est dubium quin ad rei restitutionem teneatur. I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servants leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist." See also *Scranton v. Baxter*, 4 Sandford, 5, 2 Ld. Raym. 915. A gratuitous loan is considered as strictly a personal trust, unless from other circumstances a different intention can fairly be presumed. This is well illustrated by the case of *Bringloe v. Morrice*, 1 Mod. 210. That

fect, which might possibly have been remedied, or by a casualty which might possibly have been prevented, or by superior force which might possibly have been resisted, the bailee is still not responsible, unless he was in positive default. (u)

* He has a special property in the pledge; and may maintain any action, which requires such property in the plaintiff, against a third party, for an injury to the pledge; (v) and a

was an action of trespass for immoderately riding the plaintiff's mare. The defendant pleaded that the plaintiff lent him the mare, and gave him license to ride her, and that by virtue of this license the defendant and his servant had ridden the mare alternately. The plaintiff demurred to the plea. And, *per curiam*, "The license is annexed to the person, and cannot be communicated to another; for this riding is a matter of pleasure." And *North, C. J.*, took a difference, where a certain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse is lent hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was also taken betwixt *hiring* a horse to go to York, and *borrowing* a horse; in the first place, the party may let his servant ride; in the second not. But where a horse was for sale, and the agent of the vendor let A. have the horse for the purpose of trying it, A. was held justified in putting a competent person upon the horse to try it, an authority to do so being implied. *Lord Camoys v. Scurr*, 9 C. & P. 383.

(u) *Commercial Bank v. Martin*, 1 Louis. An. Rep. 344. In this case the court say a pledgee is bound to take that care of the property pledged which a prudent person (*diligens pater familias*) would take of his own. But he is not bound to use the utmost diligence. And where it becomes necessary for a pledgee, in the exercise of the diligence required of him, to employ an agent on account of his particular profession and skill, he will not be responsible for the misconduct or neglect of the latter, where reasonable care was shown in the choice of the agent, as to his skill and ability. See also *Exeter Bank v. Gordon*, 8 New Hamp. 66; *Goodall v. Richardson*, 14 New Hamp. 567. The general rule of law, where a person re-

ceives bonds or notes for collection, as collateral security for a debt, is that he is bound to use due diligence; and if they are lost through his negligence, by the insolvency of the makers, he is chargeable with the amount. *Noland v. Clark*, 10 B. Monr. 239.

(v) It is also decided in the case of *Gibson v. Boyd*, 1 Kerr's N. B. Rep. 150, that an action will lie in favor of the pawnee against the general owner, when the rights of the former are invaded by the latter. That was an action of replevin for a mare. It appeared that the mare in question was the property of the defendant, and had been delivered by him to the plaintiff as a pledge. The defendant afterwards took the mare from the plaintiff's possession, whereupon the plaintiff brought this action, and the court held that he was entitled to recover. *Chipman, C. J.*, said:—"This is an action of replevin for a mare, in which the defendant pleaded property in himself, and also property in a third person; and the plaintiff replied to each plea that the property was in himself; upon which issue was taken. From the testimony in the case, it appeared that the mare belonged to the defendant, and was delivered to the plaintiff as a security for a debt due from the defendant to the plaintiff; the contract between them therefore was clearly that of a pawn or pledge; and the defendant and plaintiff stood in the situation of pawnor and pawnee. In this state of things the defendant took the mare from the plaintiff. It is now contended on the part of the defendant, that he being the *general* owner of the mare, the plaintiff cannot maintain this action of replevin against *him*. It is admitted to be clear law that the pawnee may maintain replevin against a stranger, and the right to retain the thing pawned, until the debt is paid, cannot be *perfect* unless this right of possession is indefeasible, and not liable

judgment in such action brought by the pledgee or by the pledgor would bar an action for the same cause by the other party. (*w*)

He has generally only a right to hold; and if he uses, it is at his own peril; and he is liable for any loss which occurs while using. If he derive a profit from this use, he must allow for it; unless this use was equally profitable to the owner. If the pledge be a horse, the bailee may use it enough to keep the horse in health, without paying for this use; but *if he take a journey with it he must pay. He may milk a cow; and indeed ought to, because not to milk her would injure the owner, by hurting the cow; nevertheless he must account for the milk, because he derives a positive profit from it. The question of use sometimes resolves itself into more or less of resulting injury; thus, he may use, carefully, books, although perhaps any use of them implies some slight injury; but not clothes, for these are more rapidly worn out, and necessarily more injured by use. (*x*) But even if he use the pawn tortiously, he is only liable to an action; his lien upon it not being thereby terminated. (*y*)

In all cases the pledgee must account for income or profits derived from the pledge; and where he is put to expense or extraordinary trouble to preserve the value of the pledge,

to be invaded or interfered with by the debtor, although he be the general owner of the thing pawned. The fallacy of the argument on the part of the defendant appears to lie in the extent of signification given to the term 'general owner.' He remains the general owner, subject to the right of the pawnee; he has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge. . . . There cannot, I conceive, be a particle of doubt that this action is maintainable."

(*w*) 48 Ed. 3, 20 b, pl. 8; 20 H. 7, 5 b, pl. 15; *Flewelin v. Rave*, 1 Bulst. 68.

(*x*) In *Coggs v. Bernard*, Lord Holt makes the following remarks upon the right of the pledgee to use the pledge while in his possession:—"If the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c., but if it be such as will be never

the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow. 123*. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat." See also *Mores v. Conham*, *Owen*, 123; *Anonymous*, 2 Salk. 522; *Thompson v. Patrick*, 4 Watts, 414.

(*y*) *Thompson v. Patrick*, 4 Watts, 414.

he may charge the owner for it, unless there be a bargain to the contrary, or the nature of the case negatives his right to make such charge.

If the pledge be stolen from him he is not liable, unless the theft arose from or was connected with a want of ordinary care on his part. (z) By the civil law, the theft raised the presumption of neglect, and the bailee was responsible unless he could show an absence of negligence on his part. We doubt whether this be the rule of the common law. If the pledge be stolen, the theft does not of itself discharge the *bailee; but the bailor may make him responsible by showing that it happened through a want of ordinary care.

By the civil law, in the case of *pignus*, the possession of the thing pledged passed to the creditor; in the case of *hypotheca*, the possession of the thing hypothecated remained with the owner. This distinction has not been deemed of great importance in England, and the difference between a pledge and a mortgage has not until lately been strongly marked. In recent times, however, and in this country, this distinction is assuming a new importance. In all our commercial cities, the *pledging* of personal property, especially of stocks, has become very common, and recent cases have established, or at least affirmed, rights and liabilities peculiar to such contract, and quite different from those which attend a mortgage. (a)

(z) Sir William Jones's distinction (Essay on Bailments, 75,) between clandestine theft and violent theft, taken from the civil law, is not sustained by common law authorities. See Co. Litt. 89 a; Southcote's case, 4 Co. 83 b.

(a) In *Cortelyou v. Lansing*, 2 Caines' Cas. in Error, 200, the distinction between a pledge and a mortgage, and the peculiar qualities of a pledge, are very fully and ably considered. In *Barrow v. Paxton*, 5 Johns. 260, the case of *Cortelyou v. Lansing* being cited by counsel, *Kent*, C. J., said: — "That case was never decided by this court. It was argued once, and I had prepared the written opinion which appears in the report of Mr. Caines; but the court directed a second argument, which, for some reason or other, was never brought on, so that no decision took place on

the points raised in the cause. How my opinion got into print I do not know. It was probably lent to some of the bar, and a copy taken, which the reporter has erroneously published as the opinion of this court." This circumstance may lessen its authority. But as Chancellor *Kent* has referred to it in his Commentaries, we venture to do so also. Whatever be its authority, of its instructiveness there can be no doubt. The learned judge says: — "The note in question came under the strict definition of a pledge. It was delivered to the defendant, with a right to detain as a security for his debt, but the legal property did not pass, as it does in the case of a mortgage, with a condition of a defeasance. The general ownership remained with the intestate, and only a special property passed

It was undoubtedly a rule of the ancient common law of England that delivery was essential to a pledge; and the *difference between a pledge and a mortgage consisted in this: The possession of the pledge passed to the pledgee, but the property did not pass; a thing mortgaged might remain in the possession of the mortgagor, but the right of property passed to the mortgagee. The pledgee held the pledge until his debt was paid, the pledge itself remaining the property of the pledgor. The mortgagee acquired the property of the thing mortgaged, the mortgagor parting with the property as in the case of a sale, reserving only the right to defeat the transfer and re-acquire the property by paying the debt. But this distinction has not always been recognized, or, at least, not accurately observed. It seems, however, to be now held, that possession of a pledge must be delivered to the pledgee; (b) that this possession may be according to the nature of the thing, and where the pledge does not permit of manual delivery, but consists of stocks, which are transferred upon the books of the company with issue of a new certificate, if the transfer be to secure a debt, and the debtor has a right to the restoration of the property on payment of the debt at any time, the transaction is a *pledge* and not a *mortgage*, although the *legal title* passes to the creditor. This is a very nice, and perhaps a difficult distinction; but as a consequence of it, it is held that the creditor takes the stock only to hold, and not to use; that the property is not in him; that he cannot sell the stock until the debt is due, and that if it be payable on

to the defendant. It is, therefore, to be distinguished from a mortgage of goods, for that is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge; but a mortgage of goods is, in certain cases, valid without delivery. The mortgage and the pledge or pawn of goods seem, however, generally to have been confounded in the books, and it was not until lately that this just discrimination has been well attended to and explained." See also *Homes v. Crane*, 2 Pick. 607; *Jones v. Smith*, 2 Ves. Jr. 372, 378; *Brownell v. Hawkins*, 4 Barb. 491. In this last

case, *Marvin, J.*, said: — "A mortgage is a sale of goods, with a condition that if the mortgagor performs some act it shall be void. If the condition is not performed, the goods become the absolute property of the mortgagee. Before the happening of the contingency, upon which the title is to be defeated or become absolute, the possession of the goods may be in the mortgagor or the mortgagee. In the case of a pledge, the property must be delivered to the pawnee. This is of the very essence of a pledge."

(b) See the cases cited in the preceding note.

demand, or payable presently without demand, he cannot sell until demand, even if it was agreed between the parties that he might sell without notice to the debtor; that if he sells, trover may be maintained against him by the debtor, as for a wrongful conversion, although the debt be not paid. As to the damages, it seems that the debtor may recover, if the stocks had risen in value, that enhanced value. Whether, if the stocks had risen and fallen, the debtor is limited to the value at the time of the unauthorized sale, or may have the highest value down to the time of trial, is not certainly decided; but it seems that he may have the highest value. (c)

(c) All these points were elaborately considered in the late case of *Wilson v. Little*, 1 Sandf. 351, 2 Comst. 443. It was an action on the case for not returning stock pledged, and for unlawfully selling the same. The case came on originally in the Superior Court of the city of New York, and was tried before *Sandford, J.* It appeared that on the 20th of December, 1845, the plaintiff borrowed of the defendant the sum of \$2,000, and gave his promissory note therefor, payable presently. The plaintiff at the same time transferred to the defendant fifty shares of the consolidated capital stock of the New York and Erie Rail Road Company. The transfer was made on the books of the corporation, where it was standing in the plaintiff's name, and was absolute in its terms. In the note, however, given by plaintiff to defendant, the stock was mentioned as having been deposited with defendant "as collateral security," with authority to sell the same, on the non-performance of the promise contained in the note, without notice to the plaintiff. Afterwards, and between the 23d of December and the 3d of January, following the date of the loan, the plaintiff's agent applied to the defendant several times, to repay the loan, and have the stock retransferred. The defendant did not comply with his request, and it afterwards appeared that he had sold the plaintiff's stock on the 24th or 25th of December. Between the 23d of December and the 3d of January, the market value of the stock in question rose from about sixty-eight dollars per share to eighty-five dollars per share. On these

facts a verdict was taken for the plaintiff, subject to the opinion of the court. The court *held*, 1. That the defendant had no right to sell the stock until he had first demanded payment of the plaintiff. 2. That the measure of damages was the value of the stock on the 3d of January. Upon the first point, *Vanderpoel, J.*, delivering the opinion of the court, said:—"The defendant held the stock in question as pledgee. It was pledged to secure the payment of a note of \$2,000, payable on demand. A pledgee cannot dispose of the pledge, until the pledgor has failed to comply with his engagements. If the pledgee sells the pledge without authority, it is a violation of his trust. It is here contended, that as the note was payable on demand, the plaintiff was in default for not paying it the moment the note was given, and that the pledgee, before selling the stock, was not bound to demand the amount loaned. The cases of sale by the pledgee, to be found in the books, are generally those where notes were payable at a future day, and where the pledgee sold the thing pledged, before the notes matured. There the pledgee was clearly in the wrong; for the pledgor had not failed to comply with his engagement. Where stock or other property is pledged as collateral security, to secure the payment of a note payable on demand, can the pledgee proceed to sell immediately, without first demanding the amount of the note? This, in the absence of judicial authority, would, to our minds, be repugnant to the fair import and spirit of the contract." After a careful

In this power of disposal, the mortgagee differs greatly from a pledgee. For it is every day's practice for a mortgagee to

examination of the authorities, the learned judge continues:—"It may then be safely assumed, that where an article is pledged to secure a debt, payable on demand, the pledgee cannot sell, without first demanding payment of the debt on demand. A contrary rule would, in its practical operation, be wholly destructive to the existence of a general property in the pawnor. Every vestige of the pawnor's interest in the pledge might be destroyed, (and that too without his knowledge,) within an hour after the pawnee is clothed with his mere special property." In reference to the measure of damages, the learned judge said:—"It is contended that in *trover* the true measure of damages is the value of the property at the time of its conversion, which, as the defendant contends, was on the 27th of December, when the stock ranged in the market from 67½ to 68 per cent. But the present is not in form, nor indeed is it in *substance*, an action of *trover*. It is a special action on the case, and I cannot imagine why *assumpsit* could not also have been maintained, for not returning to the plaintiff his stock, after tender to the defendant of the amount for which it was pledged. . . . This not being an action of *trover*, the true measure of damages is the value of the stock on the 3d of January, when stock was sold for \$85 per share. On that day the final interview took place between the defendant and Mr. Cutting, the agent of the plaintiff. The defendant's offer and conversation on that day may be regarded as constituting the final breach. But if it were otherwise, had the breach occurred earlier, the rule of damages would have been the highest value of the stock between the actual refusal of the defendant to return the same, on being offered the amount for which it was pledged, and the commencement of the suit." A question was made also as to whether the plaintiff should have tendered to the defendant the amount due him before bringing his action. The court, however, were of opinion that the evidence proved that a tender was made, and so this point was not passed upon. The case was afterwards carried up to the Court of Appeals. In that court a

question was raised which had not been suggested in the court below, namely, whether the transaction in question did not amount to a mortgage instead of a pledge, on the ground that the legal title to the stock became vested, by the transfer, in the defendant. Upon this part of the case, *Ruggles, J.*, delivering the opinion of the court, said:—"It is contended, on the part of the defendant, that the transaction was a mortgage and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellant, and was only redeemable in equity. If this be true, the Supreme Court and the court for the correction of errors must have rendered their judgments in the case of *Allen v. Dykers*, 3 Hill, 593, 7 Id. 498, upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same on the non-performance of the promise, 250 shares of a stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage, and not a pledge, the plaintiff must have failed. The sale of the stock in that case, by the lender, before the maturity of the note, did not make it the less decisive. If there had been good ground for saying, in *Allen v. Dykers*, that the stock was *mortgaged* and not *pledged*, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied that if the point had been taken it would have been overruled.

sell his mortgage, and this sale transfers the right of property from himself to the purchaser, subject to the redemption of

The argument of the defendant in this case is founded on the assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remains in the pledgor; and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, &c., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge. The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws. It is so in the case of the New York and Erie Rail Road Company. The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change

of possession, is entirely consistent with the pledge of the goods. Indeed it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale. *Reeves v. Capper*, 5 Bing. N. C. 136, was a case in which the debtor 'made over' to the creditor, 'as his property,' a chronometer, until a debt of £50 should be repaid. It was held to be a valid pledge. In the present case, the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character is qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of \$2,000, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper. The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the thing pledged, on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock. In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment; but selling without notice is not a demand of payment; and it is well settled that where no time is expressly fixed by contract between the parties, for the payment of a debt secured by a pledge,

the mortgagor. But the pledgee, having only the possession and not the property, cannot transfer the property; and holding only for security, cannot sell until the debt becomes due and is unpaid.

* Where stock was pledged to a stock-broker, and a note given with it, stating that the stock was deposited as collateral security, with authority to sell the same at the board of brokers, if the note was not paid at maturity, evidence was offered of an uniform usage of brokers to dispose of stock so pledged at their pleasure, and at any time, before or after the maturity of the note, and when the debt was paid, return an equal number of shares of the same kind; but this evidence was rejected as contrary to the law regulating these transactions, and inconsistent with the express terms of the contract. (d) Nor could the broker, in any event, sell the stock secretly, but only at the board of brokers, and openly, stating how it was held. (e)

the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately." As to a tender by the plaintiff to the defendant of the debt due to the latter before bringing the action, the Court of Appeals held that the defendant having voluntarily put it out of his power to restore the pledge, a tender of the money borrowed would have been fruitless, and was, therefore, unnecessary. As to the measure of damages, the court adhered to the rule adopted by the court below, but based their judgment in this particular upon the special circumstances of the case. *Ruggles, J.*, said:—"The ground on which the defendant insists that the damages must be estimated according to the price of the stock on the 24th of December, is that the plaintiff on learning that the defendant had sold it, might then have gone into the market, and purchased at the current price on that day. But it is evident that he was prevented from doing so by the repeated promises of the defendant to restore the stock. Although the plaintiff was strictly entitled to a re-transfer of the same shares that were pledged, it appears that his broker was willing to receive other stock of the same description and value, which the defendant promised from day to day

to give, the plaintiff being all the time ready to pay the money borrowed. Time having thus been given to the defendant, at his request, for the fulfillment of his obligation, and the plaintiff having waited for the delivery of the stock for the accommodation of the defendant, and having relied on the expectation thus held out, and lost the opportunity of purchasing at a reduced price, it is manifestly just that the plaintiff should recover according to the value of the thing pledged, when the defendant finally failed in his promises to restore it." But although such a transfer operates as a pledge and not as a mortgage, it was nevertheless held that the legal title passes to the pledgee so as to entitle the pledgor to bring his bill to redeem and to have an account of the profits of the stock. *Hasbrouck v. Vandervoort*, 4 Sandf. 74.

(d) *Allen v. Dykers*, 3 Hill, 593, 7 Id. 497.

(e) Upon this point *Walworth, C.*, remarked:—"The authority to sell the stock in question at the board of brokers, for the payment of the debt, if such debt was not paid when it became due, did not authorize the pledgees, even if they had retained the stock in their own hands, to put the same up secretly. But they should have put up

The pledgee may have his action of trover for the pledge against a third party who takes it from him, and recover its full value, because he is responsible over to the pledgor, (*ee*) but in an action against one who derives title from the pledgor, he can recover only the amount of his debt. (*f*) And the pledgor retains sufficient property in the pledge to transfer it, subject to the pledgee's right, to any buyer, who after a tender of the amount of the debt due may maintain an action of trover against the pledgee. (*ff*) Nor does such pledgee acquire an absolute title simply by the failure of the pledgor to pay the debt; there is no forfeiture until the pledgee's rights are determined by what is equivalent to a foreclosure. (*g*)

The holder of negotiable paper, even though it be accommodation paper, is not in contemplation of law a pledgee. He may, therefore, sell, discount, or pledge it, at his pleasure. (*h*) For when one has sent negotiable paper into the

the stock openly, and offered it for sale to the highest bidder, at the board of brokers; stating that it was stock which had been pledged for the security of this debt, and with authority to sell it at the board of brokers if the debt was not paid. In this way only the stock would be likely to bring its fair market value at the time it was offered for sale. And in this way alone could it be known that it was honestly and fairly sold, and that it was not purchased in for the benefit of the pledgees by some secret understanding between them and the purchasers. It is a well known fact that shares of stock are constantly sold at the board of brokers, which shares exist only in the imagination of the nominal buyers and sellers. Such sales, as every body knows, are not legally binding upon either party. When a real sale, therefore, is to be made at the board of brokers, of shares of stock which have an actual existence, and which have been pledged for the payment of a debt, with authority to sell them at that board, the stock should be specifically described at the time of such sale, as so many shares standing in the name of the pledgee and sold on account of the pledgor; so that if a full price is obtained for it on such sale, the pledgor of the stock may know that he

is entitled to the benefit of the sale. For without such specification, the sale, if an advantageous one, may be put down as a sale of stocks of the pledgee, and which have been sold on his own account. Secret sales, therefore, cannot be sustained under such an agreement or authority." It should be observed, however, that Mr. Justice *Vanderpoel*, in the case of *Wilson v. Little*, already cited, was inclined to doubt the soundness of these views of the learned chancellor. He says:—"In *Dykers v. Allen*, 7 Hill, 498, *Walworth*, Chancellor, intimates or directs how stock, which is pledged, should be sold at the board of brokers. The soundness of his views as to the mode of selling does not, perhaps, come in question here. Were it presented by this case, I should incline very strongly to the opinion, that this part of the learned Chancellor's judgment was uncalled for by the case, and has not, therefore, the weight of authority."

(*ee*) *Harker v. Dement*, 9 Gill 7.

(*f*) *Brownell v. Hawkins*, 4 Barb. 491.

(*ff*) *Franklin v. Neate*, 13 M. & W. 481.

(*g*) *Brownell v. Hawkins*, 4 Barb. 491.

(*h*) *Appleton v. Donaldson*, 3 Barr, 381; *Jarvis v. Rogers*, 13 Mass. 105.

world, and given it credit and currency, he cannot protect himself against a *bonâ fide* holder for a valuable consideration, on the ground that he did not authorize it to be used except for some particular purpose. It has been held, however, that this rule with regard to negotiable paper does not extend to a bill of lading. (i)

And so an ordinary loan of stocks does not amount to a bailment, but to a sale, to be paid for in similar kind and quantity, as otherwise the purposes of a loan could not be effected. (j)

Although transfer of possession must accompany a pledge, a re-transfer to the owner for a temporary purpose, as agent or special bailee for the pledgee, does not impair the title or possession of the pledgee. (k)

* At common law, pledges could not be taken in an execution in favor of a third party against the pledgor. (l) The

(i) *Newsom v. Thornton*, 6 East, 17.

(j) Per *Walworth, C.*, in *Dykers v. Allen*, 7 Hill, 497.

(k) *Hays v. Riddle*, 1 Sandf. 248; *Reeves v. Capper*, 5 Bing. N. C. 136. In this last case one Wilson, the captain of a ship, pledged his chronometer, then in the possession of the makers, to defendants, the owners of the ship, in consideration of their advancing him £50, and allowing him the use of the instrument during a voyage on which he was about to depart. After the voyage was ended he placed it at the maker's again, and then pledged it to the plaintiff, for whom the makers, being ignorant of the pledge to the defendants, agreed to hold it. The money advanced by the defendants not having been repaid, it was *held* that the property in the instrument was in the defendants. The counsel for the plaintiff contended that the possession of the chronometer having been parted with by the defendants, their property in it was entirely lost, upon the ground, that where the party to whom a personal chattel is pledged parts with the possession of it, he loses all right to his pledge. But, per *Tindal, C. J.*:—"As to the second point, we agree entirely with the doctrine laid down in *Ryall v. Rolle*, 1 Atk. 165, that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession, he loses his

property in the pledge; but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were, that 'they would allow him the use of it for the voyage;' words that gave him no interest in the chronometer, but only a license or permission to use it, for a limited time, whilst he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper; just as the possession of plate by a butler is the possession of the master; and the delivery over to the plaintiff was, as between Captain Wilson and the defendants, a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself." See also *Roberts v. Wyatt*, 2 Taunt. 268; *Spalding v. Adams*, 32 Maine, 211; *Flory v. Denny*, 11 E. L. & E. 584.

(l) Bro. Abr. tit. Pledges, 28; *Rex v. Hanger*, 3 Bulst. 1, 17; *Badlam v. Tucker*, 1 Pick. 389, 399. In this last case, a *quære* is made whether the cred-

common law, however, has been changed to some extent in this particular, in some of our States, by statutes.

The pledgee cannot retain a pledge for the purpose of securing other debts than those for which it was given, unless that was the intention of the parties. (*m*)

The pledgee, after the pledgor fails to pay the debt as due, may sell the pledge. If there be no definite time for the payment of the debt, the pledgee may require an immediate payment, but must, as we have seen, demand payment before selling the pledge. In all cases of sale, the pledgee must, before the sale, give a reasonable notice to the pledgor. (*n*) And it is safer and better to have a judicial sale, by a decree in chancery, whenever the State courts have power to make such decree. Such judicial process was once necessary to make the sale valid; but is not so now. (*o*) The pledgee should not buy the pledge himself; (*p*) nor sell more than enough to pay his debt, if the pledge consist of separable parts; and if the proceeds do not pay his debt, he may sue for the surplus.

This bailment is terminated either by payment and satisfaction of the debt by acts of the party or operation of law, or by its merger and discharge by the taking of such higher security as operates as a release of the simple debt for which the pledge was given.

itor might not remove the incumbrance, and then attach the property. See also *Pomeroy v. Smith*, 17 Pick. 85; *Srodes v. Caven*, 3 Watts, 258.

(*m*) *Jarvis v. Rogers*, 15 Mass. 389; *Rushforth v. Hadfield*, 7 East, 224; *Walker v. Birch*, 6 T. R. 258.

(*n*) *Tucker v. Wilson*, 1 P. Wms. 261, 1 Bro. P. C. 494, 5 Brown's Cases in Parl. 193; *Lockwood v. Ewer*, 9 Mod. 275, 2 Atk. 303; *Hart v. Ten Eyck*, 2 Johns. C. R. 100; *Stearns v. Marsh*, 4 Denio, 227; *Castello v. Bank of Albany*, 1 N. Y. Legal Observer, 25; *De Lisle v. Priestman*, 1 P. A. Browne,

176; *Lockett v. Townsend*, 3 Texas, 119. In this last case it was decided that a stipulation in a contract of pledging, that if the pledge be not redeemed within a specified time the right of property shall be absolute in the pawnee, can have no effect, and is absolutely inoperative.

(*o*) *Ibid.* But in a late case in England the right of a pledgee to sell upon non-payment is denied. *Micklewaite v. Winter*, 19 Law Times Reps. 61. This case seems opposed by the general tendency of the American cases.

(*p*) 1 Story's Eq. Jur. § 308 - 323.

SECTION V.

LOCATIO.

Locatio, in general, means a hiring; and as there are many ways of hiring, the general topic includes these particular forms, and usually the classification and the terms of the civil law are used.

1. *LOCATIO REI*;—where a thing is hired and the hirer acquires the temporary use of the thing bailed.

2. *LOCATIO OPERIS FACIENDI*;—where the bailee is hired to do some work or bestow some care on the things bailed.

3. *LOCATIO OPERIS MERCUM VEHPNDARUM*;—where the bailee is hired to carry the goods for the bailor from one place to another.

We shall consider these subjects in this order; and begin with the

LOCATIO REI. When the owner of a thing lets it to another, who is to have the use of the thing, and to pay a compensation therefor, the contract between these parties is for their mutual benefit. The bailee is therefore bound only to take ordinary care of the thing bailed. (*q*) But this obliga-

(*q*) *Reeves v. The Ship Constitution*, Gilpin, 579; *Bray v. Mayne*, Gow, 1; *Millon v. Salisbury*, 13 Johns. 211; *Harrington v. Snyder*, 3 Barb. 380; *Hawkins v. Phythian*, 8 B. Mon. 515. In the case of *Columbus v. Howard*, 6 Geo. 213, 219, Mr. Justice *Lumkin* said: "The question has been much mooted, what degree of care or diligence is required of the hirer, while using the property for the purpose, and within the time for which it was hired. Sir William Jones considered that the contract being one of mutual benefit, the hirer was bound only for ordinary diligence, and of course was responsible only for such. And this opinion appears to be now settled, upon principle, to be the true exposition of the common law. He ought, therefore, to use the thing, and to take the same care in the preservation of it which a good and prudent father

of a family would take of his own. Hence the hirer of a thing, being responsible only for that degree of diligence which all prudent men use, that is, which the generality of mankind use, in keeping their own goods of the same kind, it is very clear he can be liable only for such injuries as are shown to come from an omission of that diligence; or in other words, for ordinary negligence. If a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food; and if he does so, and the horse, in such reasonable use, is lamed or injured, he is not responsible for any damages."—In *Dean v. Keate*, 3 Camp. 4, it is held that if, upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes which the

tion varies with the nature of the thing and the circumstances. One who hires a valuable watch, easily disordered by any negligence, must be more careful than if the watch were coarser and stronger. So of a valuable horse. So it should be if any known circumstances gave the thing hired a peculiar value, calling for peculiar care. For the rule must be, that the hirer is bound to render such care, in each case, as the owner has a right to expect that a man of ordinary capacity and caution would take of the same thing, if it were his own, and under the same circumstances. (r)

latter may commit in the treatment of the horse, but if instead of that he prescribes for the horse himself, and from unskilfulness gives him a medicine which causes his death, although acting *bonâ fide*, he is liable to the owner of the horse as for gross negligence. — A somewhat peculiar question of liability arose in the case of *Davey v. Chamberlain et al.* 4 Esp. 229. It was an action on the case for negligently driving a chaise, whereby the plaintiff's horse was killed. The two defendants were proved to have been together in the chaise when the accident happened; but Chamberlain, one of the defendants, was sitting in the chaise smoking, and it was driven by the other. Erskine, for the defendants, put it to Lord *Ellenborough* whether he was not entitled to have a verdict taken for Chamberlain; the ground of his application being, that no verdict ought to pass against him, the injury having proceeded from the ignorance or unskilfulness of the other defendant, who was the person driving the chaise, and in whose care and under whose management it then was, Chamberlain remaining perfectly passive, and taking no part in the management or direction of the horse. But his lordship said that "if a person, driving his own carriage, took another person into it as a passenger, such person could not be subjected to an action, in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the king's subjects required that both should be answerable for any accident arising from the misconduct of either

in the driving of the carriage, while it was so in their joint care." The fact turned out to be, that the chaise in question had been hired by both the defendants, and a verdict passed against both accordingly.

(r) What we have stated above in the text is of great importance in its application to *hired slaves*. Inasmuch as a slave is an intelligent being, and may be supposed capable, under ordinary circumstances, of taking care of himself, his employer is not bound to so strict diligence as the hirer of an ordinary chattel. This is clearly shown by the case of *Swigert v. Graham*, 7 B. Monr. 661. It was an action on the case, brought by the plaintiff against the owners of a certain steamboat, to recover for the loss of one Edmund, the plaintiff's slave, who, while employed as a hired hand upon the defendants' boat, was drowned in the Kentucky river. *Marshall*, C. J., in delivering the opinion of the court, said: — "The material question in the case is, whether, under the actual circumstances, the owners of the boat are liable for the loss of the slave by being drowned while in their employ. And this question depends not merely upon the general principles applicable to the case of bailment on hire, as they are stated or adjudged in relation to inanimate or to mere animal property, but upon the proper application or modification of those principles in reference to the particular case of a slave hired for service as a common hand on board of a steamboat engaged in the navigation of the Kentucky and Ohio rivers. The rule that the bailee on hire is bound to ordinary diligence, and responsible for ordinary neglect, is doubtless true in all

The hirer is equally responsible for the negligence of his servants as for his own ; provided that this negligence occurred

cases of their bailment, unless there be fraud, or a special contract by which it may be varied in the particular case. But what is or is not ordinary diligence may vary, not only with the circumstances under which the subject of it may be placed, but with the nature of the subject itself. That which, in respect to one species of property, might be gross neglect, might in respect to another species be extraordinary care. And, under peculiar circumstances of danger, extraordinary exertions may be required of one who is bound only to ordinary diligence, or, in other words, the circumstances may be such, that extraordinary exertions are nothing more than ordinary diligence. Ordinary diligence, then, means that degree of care, or attention, or exertion, which, under the actual circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property, or in doing the particular thing, were it his own concern. And where skill is required for the undertaking, ordinary diligence implies the possession and use of competent skill. . . .

. . . . Applying these principles to the case of a slave hired either for general or special service, we come at once to the conclusion, that being ordinarily capable, not only of voluntary motion, by which he performs various services, but also of observation, experience, knowledge, and skill, and being in a plain case at least as capable of taking care of his own safety as the hirer or owner himself, and presumably as much disposed to do it, from his possession of these qualities, with habits and disposition of obedience implied in his condition, and on which the hirer has a right to rely, he may be expected to understand and perform many, and indeed most, of his duties, by order or direction more or less general, without constant supervision or physical control, and may be relied on, unless under extraordinary circumstances, for taking care of his own safety without particular instructions on that subject, and *a fortiori*, without being watched or followed, or led, to keep him from running unnecessarily into danger. What sort

of care or diligence, then, is the hirer to use for the safety or preservation of the hired slave ? Omitting to notice what may be necessary to his health and comfort, we should say that he ought not, by his orders, to expose him to extraordinary hazard, without necessity, though they be incident to the nature of the service ; and that when he does expose him to such hazards, necessarily or properly, he should use such precautions, by instructions or otherwise, as the circumstances seem to require, and as a man of ordinary prudence would use in so exposing his own slave. It might be necessary in sending him to the bottom of a deep well, or to the eave of a steep roof, to tie a rope around his waist. But if he were possessed of ordinary intelligence, it could not be required that, in sending him across a wide bridge, he should even be cautioned not to jump or fall from it. Nor if there were a ford as well as a bridge crossing the river, both ordinarily safe, and with each of which the slave was well acquainted, would it be deemed necessary to direct him to take the one and avoid the other, unless there were some circumstances known or apprehended at the time, changing the usual condition of one or the other ? Certainly it would not be necessary, when there was on the road which he was accustomed to travel a ford to be crossed, with which he was well acquainted, to tell him either not to go out of the usual track into the deep water, or not to take another road which he was not accustomed to travel, and which passed the river at a more dangerous place. In the navigation of our rivers by steam boats, it might become necessary, in a particular case, that some one on board should swim to the shore with a line, though the attempt might be attended with great danger. This, though incident to the navigation, would be an extraordinary hazard, and doubtless it should not be ordered, nor even permitted to be incurred without the use of such precautions within the power of the captain or other officer, as experience might indicate for the occasion. But when the boat is aground, on a bar or shoal, where the water on each

when the servant was in the discharge of his duty, or obeying the commands or instructions of his master, express or implied. When not so employed, the person, though generally a servant, does not then stand in the relation or act in the capacity of a servant, so as to fasten a liability for his conduct on his master; and a master, therefore, would not be responsible for an injury committed by a servant from his own wilful malice, in which the master had no share. (s) If

side, and to the shore on each side, is not more than three feet deep, it could not be deemed necessary, in ordering a particular individual to go to the shore through the water, to do more, even if he were unacquainted with the bar, and could not see it plainly, than to point out its extent, or the direction which he must take to the shore, or to advise caution in his proceeding, or to give such instruction as was necessary. But if he were well acquainted with the bar, or it were plainly visible through the water, and were, moreover, wide and safe, the direction to go to the shore would of itself be sufficient. It might be ordinarily assumed that the individual, whether white or black, slave or freeman, if he had common sense, would not go from the bar into the deep water, and the person giving the order would not be bound to anticipate such a deviation, and either to forbid it, or in any manner to guard against it, but might pursue his own employment. Nor do we suppose that, if he knew the individual to be a swimmer, and saw that he was purposely deviating from the bar, with the view of swimming a few yards to the shore, he would be bound to order him back, or to caution him against it, unless from the temperature of the water, or some other fact, he had reason to apprehend danger. The direction to go to the shore on such an occasion implies, without more said, that he should go by the known and safe way. It is only when, from the uncertainty or difficulty of the way, or from some other circumstance, there may be danger in executing the order given, that it is necessary, in the exercise of ordinary care or diligence, to accompany it with any other words or acts than such as are essential to make it intelligible and practicable." This point is well illustrated also by

the case of *Heathcock v. Pennington*, 11 Ired. 640. The defendant had hired of the plaintiff a slave boy, about twelve years of age, to drive a whim near the shaft of a gold-mine. The boy, while working there at night, being without an overcoat, had gone to the fire to warm himself, and on his being called to start his horse, being drowsy, fell into the mine and was killed. It was held, in an action by the plaintiff to recover the value of the slave, that the defendant was bound to use such diligence as a man of ordinary prudence would, if the property were his own; that as a slave was a rational being, so much care was not necessary as would be required of the bailee of a brute or an inanimate thing; that as the plaintiff had let the slave for this very purpose, he must be presumed to know all the dangers and risks incident to the employment; and, therefore, as it did not appear that the usual risks were in any way increased, that he could not recover. But where a slave was hired to work in gold-mines, in which wooden buckets were used for raising up water and ore, in which were valves for letting out the water, and an iron drill was dropped into a bucket, and fell through the valve, and split the skull of the slave, it was held to be a want of ordinary care. *Biles v. Holmes*, 11 Ired. 16. See also, as to the duties and responsibilities of the hirers of slaves, *McCall v. Flowers*, 11 Humph. 242; *Mims v. Mitchell*, 1 Tex. 443; *Sims v. Chance*, 7 Tex. 561; *Mitchell v. Mims*, 8 Tex. 6; *McLauchlin v. Lomas*, 3 Strob. L. 85; *Alston v. Balls*, 7 Eng. (Ark.) 664; *Jones v. Glass*, 13 Ire. L. 305.

(s) *Finucane v. Small*, 1 Esp. 315; *Foster v. Essex Bank*, 17 Mass. 479; *Brind v. Dale*, 8 C. & P. 207. See also *Butt v. Great Western Railway Co.* 7 E. L. & E. 443. But see *Sinclair v. Pearson*,

the loss occur through theft or robbery, or the injury result from violence, the hirer is only answerable when his imprudence or negligence caused or facilitated the injurious act. If a bailee for hire sells the property without authority, the bailor may have trover against even a *bonâ fide* purchaser. (t)

When the thing bailed is lost or injured, the hirer is bound to account for such loss or injury, But when this is done, the proof of negligence or want of due care is thrown upon the bailor, and the hirer is not bound to prove affirmatively that he used reasonable care. (u)

7 New Hamp. 219. See also *ante*, p. 87, n. (aa.)

(t) *Loeschman v. Machin*, 2 Starkie, 311; *Cooper v. Willomatt*, 1 C. B. 672.

(u) *Beckman v. Shouse*, 5 Rawle, 179; *Clark v. Spence*, 10 Watts, 335; *Runyan v. Caldwell*, 7 Humph. 134; *Platt v. Hibbard*, 7 Cow. 500, n. (a); *Schmidt v. Blood*, 9 Wend. 268; *Foote v. Storrs*, 2 Barb. 326; *Harrington v. Snyder*, 3 Barb. 380. This question was very thoroughly discussed in the case of *Logan v. Mathews*, 6 Barr, 417. The court below in that case instructed the jury that, "when the bailee returns the property in a damaged condition, and fails, either at the time or subsequently, to give any account of the matter, in order to explain how it occurred, the law will authorize a presumption of negligence on his part. But when he gives an account, although it may be a general one, of the cause, and shows the occasion of the injury, it then devolves on the plaintiff to prove negligence, unskilfulness, or misconduct." And this instruction was held to be correct. *Coulter, J.*, said:—"The books are extremely meagre of authority on this subject of the *onus probandi* in cases of bailment. But reason and analogy would seem to establish the correctness of the position of the court below. All persons, who stand in fiduciary relation to others, are bound to the observance of good faith and candor. The bailor commits his property to the bailee, for reward, in the case of hiring, it is true; but upon the implied undertaking that he will observe due care in its use. The property is in the possession and under the oversight of the bailee whilst the bailor is at a distance. Under these circumstances, good faith requires that

if the property is returned in a damaged condition, some account should be given of the time, place, and manner of the occurrence of the injury, so that the bailor may be enabled to test the accuracy of the bailee's report, by suitable inquiries in the neighborhood and locality of the injury. If the bailee returns the buggy, (which was the property hired in this case,) and merely says, "Here is your property, broken to pieces," what would be the legal and just presumption? If stolen property is found in the possession of an individual, and he will give no manner of account as to the means by which he became possessed of it, the presumption is that he stole it himself. This is a much harsher presumption than the one indicated by the court in this case. The bearing of the law is always against him who remains silent when justice and honesty require him to speak. It has been ruled, that negligence is not to be inferred, unless the state of facts cannot otherwise be explained. 9 Eng. Jurist, 907. But how can they be explained, if he in whose knowledge they rest will not disclose them? And does not the refusal to disclose them justify the inference of negligence? Judge Story, in his treatise on Bailments, § 410, says that it would seem that the burden of proof of negligence is on the bailor, and that proof *merely* of the loss is not sufficient to put the bailee on his defence. The position that we are now discussing, however, includes an ingredient not mentioned by Judge Story, and on which it turns; that is, the refusal or omission of the bailee to give any account of the manner of the loss, so as to enable the bailor to shape and direct his inquiries and test its accuracy.

The owner must deliver the thing hired in a condition to be used as contemplated by the parties; (*v*) nor may he interfere with the hirer's use of the thing while the hirer's property continues. (*w*) Even if the hirer abuses the thing hired, as a horse hired for a journey, although the owner may then, as it is said, repossess himself of the thing, if he can do so peaceably, he may not do so forcibly, but must resort to his action. (*x*) And if such misuse of the thing hired terminates the original contract, the owner may demand the thing, and, on refusal, bring trover; or, in some cases, without demand. (*y*)

The owner is said to be bound to keep the thing in good order, that is, in proper condition for use; and, if expenses are incurred by the hirer for this purpose, the owner must repay them. On this subject, however, there is some uncertainty in the cases. The cases usually referred to on this

Judge Story says there are discrepancies in the authorities. In the French law, as stated by him, § 411, the rule is different; and the hirer is bound to prove the loss was without negligence on his part. And he cites the Scottish law to the effect that if any specific injury has occurred, not *manifestly* the result of accident, the *onus probandi* lies on the hirer to justify himself by proving the accident. That would be near the case in hand, because the injury here was not manifestly the result of accident, and the hirer did not even explain or state how the accident occurred. The case of *Ware v. Gay*, 11 Pick. 106, seems to have a strong analogy to the principle asserted. It was there ruled that where a public carriage or conveyance is overturned, or breaks down, without any *apparent* cause, the law will *imply* negligence, and the burden of proof will be on the owners to rebut the presumption. The *primâ facie* evidence arises from the fact that there is no apparent cause for the accident. And in the case in hand, there was no apparent cause; nor would the hirer give any account of the cause. We think, therefore, there was no error in adding to the answer the qualification or explanation which we have been considering." See also *Skinner v. London, Brighton, and Southcoast Railway*

Co. 2 E. L. & E. 360. And in *Bush v. Miller*, 13 Barb. 481, where property was delivered to the defendant, who received the same, and engaged to forward it, but it was never afterwards seen nor heard of, and the defendant never accounted for it in any way, it was held that he was *primâ facie* liable for the goods without proof of negligence, which proof could not be required unless he gave some account of his disposition of the property.

(*v*) *Sutton v. Temple*, 12 M. & W. 52, 60.

(*w*) *Hickok v. Buck*, 22 Verm. 149. In this case the defendant leased to the plaintiff a farm for one year, and, by the contract, was to provide a horse for the plaintiff to use upon the farm during the term. At the commencement of the term he furnished a horse, but took him away and sold him before the expiration of the term, without providing another. It was held that the plaintiff acquired a special property in the horse, by the bailment, and was entitled to recover, in an action of trover, for the horse so taken away, damages for the loss of the use of the horse during the residue of the term.

(*x*) *Lee v. Atkinson*, Yelv. 172.

(*y*) See the case of *Fouldes v. Willoughby*, 8 M. & W. 540, as to what will amount to a conversion.

point relate to real estate; (2) but the hirer of land, or of a real chattel, has neither the same rights nor obligations with the hirer of a personal chattel. Perhaps the conflicting opinions may be reconciled, by regarding it as the true principle *that the owner is not bound (unless by special agreement, express, or implied by the particular circumstances) to make such repairs as are made necessary by the natural wear and tear of the thing, or by such accidents as are to be expected, as the casting of a horse-shoe after it has been worn a usual time; but is bound to provide that the thing be in good condition to last during the time for which it is hired, if that can be done by reasonable care, and afterwards is liable only for such repairs as are made necessary by unexpected causes. (a)

On the part of the hirer there is an implied obligation to use the thing only for the purpose and in the manner for which it was hired; and in no way to abuse it. (b)

The hirer must surrender the property at the time appointed; and if no time be specified in the contract, then whenever called upon after a reasonable time; and what this is

(2) *Pomfret v. Ricroft*, 1 Saund. 321; *Taylor v. Whitehead*, Douglas, 744; *Cheetham v. Hampson*, 4 T. R. 318; *Ferguson v. —*, 2 Esp. 590; *Horsefall v. Mather*, Holt, N. P. 7.

(a) There is very little direct authority in our books upon this question. In *Pomfret v. Ricroft*, 1 Saund. 321, Lord Hale says: — "If I lend a piece of plate, and covenant by deed that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without my fault, no action of covenant lies against me." But this is only a *dictum*. So in *Taylor v. Whitehead*, Doug. 744, Lord Mansfield says in general terms, that by the common law he who has the use of a thing ought to repair it. But he probably had his mind upon real property. In the case of *Isbell v. Norvell*, 4 Grat. 176, it is held that where the hirer of a slave pays a physician for attending on the slave while he is hired, he is entitled to have the amount repaid him by the owner of the slave. But in the case of *Redding v. Hall*, 1 Bibb, 536, the same question was decided the other way,

after a careful [examination of the authorities. It is impossible to say with certainty what the true rule of law is until we have further adjudication. But it seems to be certain that the hirer of an animal is bound to bear the expense of keeping it, unless there is an agreement to the contrary. See *Handford v. Palmer*, 2 Brod. & Bing. 359.

(b) *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Wheelock v. Wheelwright*, 5 Mass. 104; *De Tollenere v. Fuller*, 1 So. Car. Const. Rep. 116; *Duncan v. Rail Road Company*, 2 Rich. 613; *Columbus v. Howard*, 6 Geo. 213; *Harrington v. Snyder*, 3 Barb. 380. In the case of *Mullen v. Ensley*, 8 Humph. 428, the defendant, having hired a slave of the plaintiff, for general and common service, set him to blasting rocks, and the slave while so engaged was severely injured. The court held the defendant liable. And *Turley, J.*, said: — "We are of opinion that the employment of blasting rocks is not an ordinary and usual one; that it is attended with more personal danger than is common to the usual voca-

will be determined in each case by its nature and circumstances. (c)

By the contract of hire, the hirer acquires a qualified property in the thing hired, which he may maintain against all persons except the owner, and against him so far as the terms and conditions of the contract, express or implied, may warrant. (d) During the time for which the hirer is entitled to the use of the thing, the owner is bound not to disturb him in that use; and if the hirer returns it to the owner for a temporary purpose, he is bound to return it to the hirer. (e)

It is held that if a hirer fastens hired chattels to real estate, in such a way that they cannot be removed without injury to the real property, a purchaser of the land, without notice, holds the chattels, and the owner of them must look to the hirer for compensation. (f)

The letter for hire acquires an absolute right to, and property in, the compensation due for the thing hired; and this compensation or price, where not fixed by the parties, must be a reasonable price, to be determined, like the time for which the thing is hired, by the nature and circumstances of the case.

The contract of hire may be terminated by the expiration of the time for which the thing was hired, or by the act of either party within a reasonable time, if no time be fixed by the contract. Or by the agreement of both parties at any time. Or by operation of law, when the hirer becomes the owner of the thing hired. Or by the destruction of the thing hired. If it perish without the fault of either party, before any use of it by the hirer, he has nothing to pay; if after

tions of life; and that a bailee, who has hired a negro for general and common service, has no right to employ him in such an occupation, without the consent of his owner." But in the case of *McLauchlin v. Lomas*, 3 Strobb. 85, where a negro was let to hire as a house carpenter, and was employed by the hirer in his shop, where he carried on the business of a house carpenter, and where his workmen were accustomed to use a steam circular saw, when necessary for their work at the business, and the negro, while at work at the saw,

received wounds of which he died, and in an action by the owner to recover the value of the slave from the hirer, the jury gave a verdict for the defendant, the court refused to grant a new trial. *Richardson, J.*, dissented.

(c) See *Esmay v. Fanning*, 9 Barb. 176.

(d) See *Hickok v. Buck*, 22 Verm. 149, cited *ante*, p. 607, n. (w.)

(e) *Roberts v. Wyatt*, 2 Taunt. 268.

(f) *Fryatt v. The Sullivan Company*, 5 Hill, 116, 7 Id. 529.

some use, it may be doubted how far the aversion of the law to apportionment would prevent the owner from recovering *pro tanto*; probably, however, where the nature of the case admitted of a distinct and just apportionment, it would be applied. (g) Either party being in fault would of course be *answerable to the other. And the contract might provide for the contingency of the destruction of the property in any manner.

LOCATIO OPERIS FACIENDI. The cases in which the bailee is to do some work or bestow some care upon or about the thing bailed, may be conveniently divided into those where,

1. Mechanics are employed in the manufacture or repair of the article bailed to them.

2. Warehousemen or wharfingers are charged with the custody of the thing bailed.

3. Postmasters receive letters to be sent as directed.

4. Innkeepers receive the goods of guests.

Where mechanics are employed to make up materials furnished, or to alter or repair a specific thing, the contract is one of mutual benefit, and only ordinary care is required. But this care may vary much in different cases. Common wood may be given to a carpenter to make a common box. A chronometer may be delivered to a watchmaker to be cleaned or repaired. A diamond may be given to a lapidary to be cut and polished. The care required in these cases is very different; but it is always *ordinary* care; that is, such care as a person of ordinary caution and capacity would take of that specific thing. So of the skill required. A person who receives a chronometer to repair, and undertakes the work, warrants that he possesses and will exert the care and the skill requisite to do that work properly, and to preserve the article safely. If, however, one chooses to employ, on a work requiring great and peculiar skill, one whom he

(g) See *Harrington v. Snyder*, 3 Barb. 380. As to apportionment in cases of hired slaves, where the slave dies during the period of his service, see the following cases. *George v. Elliott*, 2 Hen. & Munf. 5; *Williams v. Holcombe*, 1 N. C. Law Rep. 365; *Bacot v. Parnell*, 2 Bailey, 424; *Redding v. Hall*, 1 Bibb. 536; *Harrison v. Murrell*, 5 Monr. 359; *Dudgeon v. Teass*, 9 Missouri, 867; *Collins v. Woodruff*, 4 Eng. [Ark.] 463.

has reason to know to be deficient in that skill, he can have no remedy for the want of it. (*gg*)

The obligations of the workman are, to do the work in a proper manner, and at the time agreed on, or in a reasonable time if none be specified; to employ the materials furnished in the right way, and not only to guard * against all ordinary hazards, but to use his best endeavors to protect the thing delivered to him against all peril or injury. And he should do the work himself, where, from the circumstances, it may be presumed that the personal ability or skill of the workman are contracted for.

The workman has a special property in the thing delivered to him, and may maintain an action against one who wrongfully takes it from his possession. If it perishes in his hands, without his fault, the owner loses the property. And from the authorities it might seem that the owner is also bound to pay *pro tanto* for the work and labor already expended upon it, (where the contract does not provide otherwise,) as well as the materials used and applied. (*h*) We doubt, however, if the practice in this country be altogether so; it is certain that a distinct usage to the contrary would control any such rule; (*i*) and without asserting that there is any such established usage, we think that, generally, where an owner leaves a chattel with a workman who is to labor upon it, and the chattel is accidentally destroyed when this labor has been partially performed, each loses what each one has in the thing destroyed; the owner his property, and the workman his labor. If the thing perishes from intrinsic defect, the reason for requiring *pro tanto* compensation from the owner would be stronger.

Where the workman is employed to make a thing out of his own materials, it is a case of purchase and sale, or hiring of labor, and not of bailment. But if the principal materials

(*gg*) *Felt v. School Dist.*, 24 Verm. 297.

(*h*) *Menetone v. Athawes*, 3 Burr. 1592; *Wilson v. Knott*, 3 Ilumph. 473. See also *Brumby v. Smith*, 3 Ala. 123.

(*i*) It would seem from *Gillett v. Mawman*, 1 Taunt. 137, that a general

usage, to the effect that the workman was not entitled to be paid until his work was finished, would prevent his recovering for his work and labor on an article accidentally destroyed, while the work was going on.

are delivered to the workman, this is a case of bailment, although he is to add his own materials to them. (j)

*Where materials are delivered to a workman, and a fabric is

(j) *Merritt v. Johnson*, 7 Johns. 473. This subject was thoroughly discussed in the case of *Gregory v. Stryker*, 2 Denio, 628. It was an action of trespass for a wagon, and the defendant, who was a constable, justified the seizure of it under an execution against one Rose; and the question was whether the wagon when taken by the defendant belonged to the plaintiff or Rose. It appeared that the wagon in question formerly belonged to the plaintiff, and that he made a contract with Rose to repair it for him. Before the wagon was repaired, it was worth but little, except the iron; none of the wooden part was used in the reparation except the tongue and eveners. When finished it was worth \$90, and Rose's account for repairs amounted to \$78.50. The defendant took the wagon in the possession of Rose immediately after it was completed, and sold it on the execution. Upon these facts the court held that the property in the wagon still continued in the plaintiff. And *Beardsley, J.*, said:—"As the value of the new materials and labor used and employed in repairing or reconstructing the wagon greatly exceeded that of the old materials used in the operation, it was urged that this was really a contract with Rose to make a new wagon, and not for the repair of an old one, and therefore, as most of the materials were furnished by him, his right of property in the vehicle would continue until its completion and delivery under the contract. No doubt where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or out of materials the principal part of which are his own, the property of the article, until its completion and delivery, is in him, and not in the person for whom it was intended to be made. But it is equally clear, as a general proposition, that where the owner of a damaged or worn out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article as thus repaired and improved is all along in the original owner, for whom the repairs were made, and not in the person

making them. The agreement in such case is but an every day contract of bailment—*locatio operis faciendi*; and the original owner, so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessorial additions are made in bringing it to its new and improved condition. Nor am I aware that in this class of cases it is at all important what the value of the repairs, actual or comparative, may be. No case is referred to which proceeds on that distinction, nor any writer by whom it is adverted to as material. If we adopt this distinction, what shall be its limit? The general property must be in one party to the exclusion of the other, for surely they are not tenants in common in the thing repaired. Shall we then say that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition, and *vice versa*, where they exceed it in value, title to the article, as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied without great difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. There are a multitude of instances in which the expense of proper repairs greatly exceeds the value of the article on which they are made. It is so in the lowly operation of footing an old pair of boots, and not unfrequently in repairing a broken down carriage. The principle contended for by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied. This affords ample protection to the mechanic. And who, let me ask, ever heard that his lien was limited to re-

to be returned by him, made at his own election, either of those materials or of similar materials of his own, as if a certain weight of silver be given him, to be returned in the form of a silver goblet, or a certain quantity of wheat to be returned in flour, some difficulty has arisen, and some conflict of opinion. We * should regard such a contract not as a *locatio operis faciendi*, but as creating an obligation of a different character on the part of the workman: one, indeed, more similar to a debt. If the contract expressly, or by a clear implication, imported that the fabric to be returned should be made specifically of the very material delivered, then, if the material should perish or be lost, without the fault of the workman, it would be the loss of the owner. In the former case, where the workman was at liberty to use what materials of like quality he would, those delivered to him would be regarded only as a partial payment in advance for the thing to be made and delivered to him who advanced it, and the workman would be still bound to make and deliver this article. (*k*)

pairs which, in value, fall below that of the original article on which they are made? Yet this limitation must necessarily exist, if the ground assumed by the counsel for the defendant is well taken."

(*k*) This subject has been very much discussed within the last few years, especially in the courts of New York. The earliest case that we have seen is that of *Seymour v. Brown*, 19 Johns. 44. There the plaintiff sent to the defendant, a miller, a quantity of wheat to be exchanged for flour at the rate of a barrel of flour for every five bushels of wheat. The defendant mixed the plaintiff's wheat with the mass of wheat of the same quality belonging to himself and others; but, before the flour was delivered to the plaintiff, the mill of the defendant, with all its contents, wheat and flour, was entirely destroyed by fire from some unknown cause, and without any fault or negligence on the part of the defendant. It was *held* that the defendant was not responsible for the loss of the plaintiff's wheat, there being no contract of sale by which the property was transferred to the defendant. This case was decided in the year 1821. A few months afterwards, a case

was decided the same way by the Court of Appeals of Virginia, on a somewhat similar state of facts. *Slaughter v. Green*, 1 Rand. 3. In 1825, the question came up in Indiana in the case of *Ewing v. French*, 1 Blackf. 353. The facts of the case were almost identical with those in *Seymour v. Brown*, and the court *held* that the plaintiff was entitled to recover. *Seymour v. Brown* having been cited, *Blackford, J.*, said: "That decision, it is admitted, cannot be reconciled with ours; but as an independent tribunal, we must, after consulting the authorities within our reach, determine for ourselves as to what the law is, however unpleasant it may be to differ from a court so eminently distinguished as that of New York." In 1827 came the case of *Hurd v. West*, 7 Cow. 752. In that case the defendant had let a number of sheep to one Dayton, and Dayton, while the sheep were in his possession, had sold them to the plaintiff. And the question was, whether the property in the sheep was in Dayton, so that he could transfer them to the plaintiff. *Woodworth, J.*, in remarking upon the evidence, which was somewhat uncertain, said: — "It seems to me the first question was, *whether the*

It is not always easy to determine the rights and obligations of the parties, when the workman does his work imper-

identical sheep, if they survived, were to be returned, or the same number of sheep, and of as good quality. In the first case, the title would still have continued in the defendant below, with the right to assert it when the period of letting expired. If the terms of the letting were as in the second case, or in the alternative, the right of the defendant below rested in contract; for he was not authorized to claim the identical sheep." *Seymour v. Brown* was not cited or alluded to either by the counsel or the court in *Hurd v. West*, but the reporter, in a learned note, in which he discusses the question, considers the former as substantially overruled by the latter, and such would seem to be the case from the language which we have quoted. Afterwards, in 1839, the precise question passed upon in *Seymour v. Brown* came up again in the same court, in *Smith v. Clark*, 21 Wend. 83, in which the former case was considered by the court, and overruled. Since that time the courts of New York have uniformly held the law as we have stated in the text. See *Pierce v. Schenck*, 3 Hill, 28; *Baker v. Woodruff*, 2 Barb. 520; *S. C. nom. Norton v. Woodruff*, 2 Comst. 153; *Mallory v. Willis*, 4 Comst. 76. In this last case, the rule as now held was very clearly stated by *Bronson, C. J.* "The distinction," says he "which will be found to run through all the authorities on this subject, with the exception of two cases which have been overruled, is this; when the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed. But when there is obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale." The same doctrine is held in the late cases of *Wadsworth v. Allcott*, 2 Selden, 64; *Foster v. Pettibone*, 3 Selden, 433; *Chase v. Washburn*, 1 Ohio State Reps. 244. A similar rule was laid down in *Buffam v. Merry*, 3 Mason, 478. In that case A. delivered yarn to B., on a contract that the same should be manufactured into plaids. B. was to find the *filling*, and was to weave

so many yards of the plaids at 15 cents per yard, as were equal to the value of the yarn at 65 cents per pound. It was held that by the delivery of the yarn to B. the property thereof vested in him. On the other hand, in *King v. Humphreys*, 10 Barr, 217, where rags were delivered by the plaintiff to the defendant at a certain price, under a special contract, to be made into paper, which was to be returned at a certain price—the difference to be paid by a note; and paper was manufactured out of the identical rags; it was held that the property in the rags and paper continued in the plaintiff. But it appeared that this was the usual mode in which the trade made contracts for working rags into paper; and the court seem to put their decision upon the ground that the plaintiff was entitled to receive the paper made of the identical rags delivered. If this was the ground of the decision, the case does not conflict with what we have stated to be the established rule; the question in the case was one of construction, and it resembled in this respect the case of *Mallory v. Willis*, already cited. In that case the plaintiff agreed to deliver good merchantable wheat at a flouring mill carried on by the defendant, "to be manufactured into flour." The defendant agreed to deliver 196 pounds of superfine flour, packed in barrels to be furnished by the plaintiff, for every four bushels and fifteen pounds of wheat. He was to be paid sixteen cents per barrel, and two cents *extra*, in case the plaintiff made one shilling net profit on each barrel of flour. The defendant was to guarantee the inspection. The plaintiff was to have the "offalls or feed," which the defendant was to store until sold. It was held that the contract imported a bailment of the wheat, and not a sale, and therefore that the plaintiff might maintain replevin for a portion of the flour manufactured from the wheat delivered under the contract. But *Bronson, C. J.*, and *Harris, J.*, dissented from the judgment of the court, and delivered able opinions. There was no difference of opinion, however, among the members of the court, as to the general rule; the only question between them was one of construction.—

fectly, or in a manner different from that desired, or leaves it unfinished. The difficulty is in the application of the prin-

A question somewhat similar to the one that we have been considering arises where materials are delivered to be worked up at the shares, as it is termed. But in that case it is *held* that the contract is one of bailment, and not of sale. The question arose in *Pierce v. Schenck*, 3 Hill, 28. Logs were delivered by the plaintiff at the defendant's saw-mill, under a contract with the defendant that he should saw them into boards within a specified time, and that each party should have one half of the boards. It was *held* that the transaction enured as a bailment merely, and that the bailor retained his general property in the logs till all were manufactured pursuant to the contract. And *Cowen, J.*, said:—"The plaintiff delivered his logs to the defendant, who was a miller, to be manufactured into boards—a specific purpose from which he had no right to depart. On completing the manufacture he was to return the specific boards, deducting one half as a compensation for his labor. It is like the case of sending grain to a mill for the purpose of being ground, allowing the miller to take such a share of it for toll. This is not a contract of sale, but of bailment—*locatio operis faciendi*. The bailor retains his general property in the whole till the manufacture is completed; and in the whole afterwards minus the toll. The share to be allowed is but a compensation for the labor of the manufacturer, whether it be one tenth or one half. Thus, in *Collins v. Forbes*, 3 T. R. 316, it appeared that Forbes furnished certain timber to one Kent, which the latter was to work up into a stage for the commissioners of the victualling office, he to receive one fourth of the clear profit and a guinea per week, on the work being done. This was holden to be a bailment by Forbes. So in *Barker v. Roberts*, 8 Greenl. 101, A. agreed to take B.'s logs, saw them into boards, and return them to B., who was to sell them and allow to A. all they brought beyond so much. This was *held* to be a bailment, and not a sale, though it was expressly agreed that the logs should remain all the while at A.'s risk. A having sold the logs instead of sawing them, B. was allowed to re-

cover their value against A.'s vendee. What difference is there in principle between an agreement by the owner to pay a share of the avails in money, and in a part of the specific thing? Either is but a compensation for his labor. . . . I have been unable to see any difference in the nature of the contract, whether there be an obligation to restore the whole, or only a part of the specific thing. The owner of the goods may reserve the general ownership in the whole or in any part, as he pleases; and he can with no more propriety be said, *pro tanto* at least, to have parted with it in the latter case than in the former."—We have already had occasion to refer to *Hurd v. West*, 7 Cow. 752. Perhaps that case deserves some further notice. It was ruled in that case, as we have seen, that where one lets chattels for hire, with an agreement on the part of the bailee, in the alternative, either to return the specific chattels, or others of a similar quality; that such a transaction amounts not to a bailment, but to a sale. The Supreme Court of Vermont have, however, in a series of cases, and after much consideration, decided the same point the other way. The question arose for the first time, we believe, in the latter State, in the case of *Grant v. King*, 14 Verm. 367. There the owner of cattle leased them, with a farm, for four years, under an agreement that, at the expiration of the four years, the lessee might either return the cattle or pay a stipulated price for them. The lessee sold the cattle before the four years had expired. And it was *held* that the lessor might maintain trover for them against both seller and purchaser. The same question arose again in *Smith v. Niles*, 20 Verm. 315, and in *Downer v. Rowell*, 22 Verm. 347, and was decided the same way. In the latter case, the plaintiff delivered to the defendant certain sheep, and the defendant executed a receipt therefor, in which he agreed to keep the sheep, or cause them to be kept, "the full term of three years, and return the same, or others in their place as good as they are." *Held*, that this was not a sale of sheep to the defendant, nor a bailment with power to sell, but that it was a bailment of the pro-

ciples of law to the facts, rather than in ascertaining those principles. We think they may be stated thus.

If the workman, by a deviation from his instructions, makes his work of no use, he can claim no compensation. If the article be still of some use, and be received by the employer, the workman may claim *pro tanto*; but his claim is open to a set-off or cross action for any demand the employer may have for damages sustained by the deviation. If the work be done by special contract, and there be a departure from its terms, the workman can recover nothing under the contract; but may on a *quantum meruit*, if his labor was useful to his employer and its benefit accepted, but subject to set-off as before. And undoubtedly, if the deviation be important, and the materials have been so used as to have lost their value as such, the employer may abandon them to the workman, and recover of him their value. So if the thing be left imperfect and unfinished, by the fault of the workman, he can recover nothing; but if not by his fault, then he should have compensation *pro tanto*, subject to set-off. And if the contract be rescinded by the act or assent of both parties, then the workman may recover *pro tanto*. If the deviation be such as makes the thing more valuable and more

perty for a certain period, with a stipulation for its return at the expiration of the bailment; and that the property in the sheep would not vest in the bailee, until he had performed his part of the agreement, by returning to the plaintiff other sheep of equal quality; and that, for a conversion of the sheep, the plaintiff could sustain an action of trover. And *Kellogg, J.*, having cited and commented upon *Grant v. King and Smith v. Niles*, said:—"We are aware that the case of *Hurd v. West*, 7 Cow. 752, cited at the argument, is opposed to the view which we take of the case before us. There the court seem to consider that the alternative words in the contract determine its character,—that the right of the party to return other sheep of equal value makes the contract operate as a sale,—that such is the legal effect of the contract, and that upon the delivery of the property it vests in the bailee, or vendee. This decision is admitted to be in direct conflict with the

case of *Seymour v. Brown*, 19 Johns. 44,—which last case is said to be overruled. Which of the two cases is the better law I do not deem it necessary to inquire, as I think the case at bar must be controlled by the decisions of our own court. It is analogous to the case of *Smith v. Niles*, and I think in principle cannot be distinguished from it. It may be asked, if the property at the time of the bailment does not pass, when does it vest in the bailee? We answer *certainly not until* the bailee performs his part of the contract, by returning other sheep of equal goodness. That sufficiently secures to the bailor a return of the property bailed, and affords to the bailee all that he could claim, upon the most liberal construction of the contract. This construction of the contract is most beneficial to the defendant, and carries into effect, we think, the obvious intention of the parties."

costly, the workman cannot recover for this additional cost, unless the employer assented thereto. (*l*)

In this last case, and in some others, it is often important and difficult to determine what is an assent on the part of the employer, and what assent is sufficient. (*m*) Knowledge * and silence might be considered so, if a knowledge of the deviation existed while it was going on, and the employer could put a stop to it. But not if only known afterwards, and when too late to prevent or arrest the alteration. It would certainly be safer and more just for the employer to signify his disapprobation as soon as possible; and his not doing so would be a circumstance, which, connected with others, as directing other alterations in conformity, and the like, might lead to an inference that he assented to and adopted the alteration.

Contracts for work and labor in making some article frequently contain a provision, that if there be alterations made with the assent of both parties, such alterations shall be paid for or allowed for at the same rate of payment as that provided by the contract for the work it specifies; and we think that such would be the operation of law, without an express stipulation. (*n*)

A workman employed to make up materials, or to alter or repair a specific article, has a lien upon the materials of the thing for his pay. (*o*)

(*l*) The principles stated above in our text are not peculiar to the contract of which we are now treating. They apply equally to several other species of contracts; and we have already had occasion to consider them somewhat in our chapter on the hiring of persons. We shall defer their farther consideration and the citation of cases until we come to the chapter on Construction, in our second volume.

(*m*) See *Lovelock v. King*, 1 M. & Rob. 60. See also *ante*, pp. 540 - 542.

(*n*) See *ante*, p. 512, and note (*g*).

(*o*) *M'Intyre v. Carver*, 2 W. & S. 392. In this case it is decided that every bailee, who has by his labor and skill conferred value upon specific chattels bailed to him, has a particular lien on them; but such lien does not exist in favor of a journeyman or day-laborer.

So in *Morgan v. Congdon*, 4 Comst. 551, it is *held* that every bailee for hire, who by his labor or skill imparts additional value to the goods, has a lien thereon for his charges, there being no special contract inconsistent with such lien. And such lien extends to all the goods delivered under one contract, and is not confined to the particular portion on which the labor has been bestowed. Accordingly, where a quantity of logs were delivered on different days at the defendant's saw-mill, upon an agreement to saw the whole quantity into boards, and the defendant sawed a part of them, and delivered the boards to the bailor, without being paid for the service; it was *held* that he had a lien for the amount of his account upon the residue of the logs in his possession. And the care, skill, and labor employed

WAREHOUSE-MEN. This is also a contract for mutual benefit; and the bailee is therefore only held to ordinary diligence. (*p*) The forwarding merchants of this country are * only subject to the liabilities of warehouse-men, (*q*) unless

by a trainer upon a race horse give him a right of lien, but he waives this lien by contracting to allow the owner of the horse to take it for racing whenever he chooses. *Forth v. Simpson*, 13 Q. B. 680.

(*p*) *Chenoweth v. Dickinson*, 8 B. Monr. 156; *Footo v. Storrs*, 2 Barb. 326; *Hatchett v. Gibson*, 13 Ala. 587; *Cailiff v. Danvers*, Peake's Cas. 114; *Platt v. Hibbard*, 7 Cow. 497; *Knapp v. Curtis*, 9 Wend. 60. But if an uncommon or unexpected danger arise, he must use efforts proportioned to the emergency to ward it off. *Leck v. Maestaer*, 1 Camp. 138. In this case the defendant was the proprietor of a dry-dock, the gates of which were burst open by an uncommonly high tide, and the plaintiff's ship, which was lying there, forced against another ship and injured. It was sworn, that with a sufficient number of hands the gates might have been shored up in time so as to bear the pressure of the water; and, though the defendant offered to prove that they were in a perfectly sound state, Lord *Ellenborough* held that it was his duty to have had a sufficient number of men in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of the deficiency. So a wharfinger who takes upon him the mooring and stationing of the vessels at his wharf is liable for any accident occasioned by his negligent mooring. *Wood v. Curling*, 15 M. & W. 626, 16 Id. 628.—The same rule applies to an agister of cattle. *Broadwater v. Blot*, Holt, N. P. 547.

(*q*) *Roberts v. Turner*, 12 Johns. 232. This is a very important case on the liability of *forwarding merchants*. It was an action on the case against the defendant as a common-carrier. The defendant resided at Utica, and pursued the business of *forwarding* merchandise and produce from Utica to Schenectady and Albany. It appeared that the course of business was, for the *forwarder* to receive the merchandise or produce at his store, and send it by the boatmen who transported goods on the Mohawk

river, or by wagons to Schenectady or Albany, for which he was paid at a certain rate per barrel, &c.; and his compensation consisted in the difference between the sum which he was obliged to pay, and that which he received from the owner of the goods. The defendant received from the plaintiff, who resided in Cazenovia, in Madison county, by one Aldrich, his agent, twelve barrels of pot ashes, to be forwarded to Albany to one Trotter; the ashes were put on board a boat, to be carried down the Mohawk to Schenectady, and, while proceeding down the river, the boat ran against a bridge and sunk, and the ashes were thereby lost. The defendant's price for forwarding to Schenectady was twelve shillings per barrel, and the price which he had agreed to pay for transporting the goods in question to that place was eleven shillings; he had no interest in the freight of the goods, and was not concerned as an owner in the boats employed in the carriage of merchandise. The judge being of opinion that these facts did not make the defendant a common-carrier, nonsuited the plaintiff; and a motion having been made to set the nonsuit aside, *Spencer, J.*, said:—"On the fullest reflection, I perceive no grounds for changing the opinion expressed at the circuit. The defendant is in no sense a common-carrier, either from the nature of his business, or any community of interest with the carrier. Aldrich, who, as the agent of the plaintiff, delivered the ashes in question to the defendant, states the defendant to be a forwarder of merchandise and produce from Utica to Schenectady and Albany; and that he delivered the ashes, with instructions from the plaintiff to send them to Col. Trotter. The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud. To extend this rigorous law to persons standing in the defendant's situation, it seems to me, would be unjust and unreasonable. The plaintiff knew, or might have known, (for his agent knew,) that the defend-

they act also as common-carriers, in which case they come * under the peculiar rules to be hereafter noticed. It may sometimes be difficult to determine in which capacity such a person acted at the time of the loss. But, in general, the rule is, that if the transit had terminated, and the bailee was only under an engagement to forward the goods by another carrier, he is only a warehouse-man. (r) Nor will it cause him to continue to be a common-carrier until the next carrier receives the goods, that he has no distinct compensation as warehouse-man. (s) But if the goods are housed by the carrier between the termini of his transit, they are still under his charge as carrier. (t) And if he pays the warehouse rent to another person, he is still liable as carrier, if his duty have not terminated, and he is bound by the contract or the usage

ant had no interest in the freight of the goods, owned no part of the boats employed in the carriage of goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person, thus circumstanced, should be deemed an insurer of goods forwarded by him, an insurer too without reward, would, in my judgment, be not only without a precedent, but against all legal principles. Lord Kenyon, in treating of the liability of a carrier, (5 T. R. 394,) makes this the criterion to determine his character; whether, at the time when the accident happened, the goods were in the custody of the defendants as common-carriers. In *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581, the defendants, who were common-carriers, undertook to carry goods from Stourport to Manchester, and from thence to be forwarded to Stockport. The goods arrived at Manchester, and were put into the defendants' warehouse, and burnt up before an opportunity arrived to forward them. Lord Kenyon held the defendants' character of carriers ceased when the goods were put into the warehouse. This case is an authority for saying, that the responsibilities of a common-carrier and forwarder of goods rest on very different principles. In the present case the defendant performed his whole undertaking; he gave the ashes in charge to an experienced and faithful boatman. It has been urged

that the defendant derived a benefit from the carriage of the goods, in receiving cash from the owners of produce, and paying the boatmen in goods, and also in charging more than he actually paid. The latter suggestion is doubted in point of fact; but admitting the facts to be so, these are advantages derived from the defendant's situation as a warehouse keeper and forwarder of goods, and by no means implicate him as a carrier; for surely the defendant is entitled to some remuneration for the trouble in storing and forwarding goods. In any and every point of view, there is not the least pretext for charging the defendant with this loss as a common-carrier."

(r) *Garside v. Trent and Mersey Navigation*, 4 T. R. 581. In this case the defendants, being common-carriers between Stourport and Manchester, received goods from the plaintiff at Stourport, to be carried to Manchester, and to be forwarded from the latter place to Stockport. The defendants carried the goods to Manchester, and there put them in their warehouse, in which they were destroyed by an accidental fire before they had an opportunity of forwarding them. The court held that they were not answerable for the loss. See also *Brown v. Denison*, 2 Wend. 593; *Ackley v. Kellogg*, 8 Cow. 223.

(s) See *Garside v. Trent and Mersey Navigation Co.*, 4 T. R. 581.

(t) *Forward v. Pittard*, 1 T. R. 27.

to deliver the goods. (*u*) But if he is only bound to keep them safely until the consignee or owner calls for them, he is then only a warehouse-man, although the goods be in his own store. (*v*) And if he undertakes to forward them beyond his * own route, and for that purpose puts them into a suitable vehicle, or otherwise disposes of them in a proper way for that purpose, he is liable only for negligence. (*w*) And if he receives goods as warehouse-man into his store on his own wharf, for the purpose of carrying them forward, he is not liable as a carrier for their loss until their transit begins, actually or constructively, because until then he does not assume the character of a carrier. (*x*)

It is not necessary that the goods be housed to affect the bailee with the liabilities of a warehouse-man. It is enough if they are actually within his charge and custody for the purpose of being housed. (*y*)

(*u*) *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389.

(*v*) *Webb, in re*, 8 Taunt. 443. In this case, A., B., C., and D., in partnership as carriers, agreed with S. & Co., of Frome, to carry goods from London to Frome, where they were to be deposited in a warehouse belonging to the partnership at Frome, where A. resided, without any charge for the warehouse-room, till it should be convenient for S. & Co. to take the goods home. Goods of S. & Co., carried by the partners from London to Frome, under this agreement, were deposited in the warehouse at the latter place, and destroyed by fire. It was *held* that the partners were not liable to S. & Co. for the value of the goods burnt. So in the case of *Thomas v. The Boston and Providence R. R. Corporation*, 10 Met. 472, it was *held* that the proprietors of a railroad, who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common-carriers, for the loss of the goods from the warehouse, but are liable, as depositaries, only for want of ordinary care.

(*w*) Thus, where common-carriers received goods on board their sloop, to transport from New York to Troy, where they transferred them on board

of a canal boat bound to the north, pursuant to the bailor's instructions; but were to receive no reward for the transfer or further transportation; and the goods were lost by the upsetting of the canal boat; it was *held* that their character of common-carriers ceased at Troy; and having exercised ordinary care in seeing the goods placed on board a safe boat, they were not responsible for the loss. *Ackley v. Kellogg*, 8 Cow. 223.

(*x*) *Platt v. Hibbard*, 7 Cow. 497. In *White v. Humphery*, 11 Q. B. 43, where the plaintiff deposited hops in the defendant's warehouse to be conveyed to London in the barges of the defendant (who was also a carrier,) whenever the plaintiff should direct, and in the meantime to be kept by the defendant without charge for warehousing, it was *held* by the judge *ad nisi prius* that the advantage of carrying the hops for hire might be considered as payment for the warehousing, and that the defendant was not, therefore, a gratuitous bailee, and so liable only for gross negligence; and the Court of Queen's Bench refused to grant a new trial on the ground of misdirection.

(*y*) Thus it has been decided, that as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse, the liability of the warehouse-man commences; and

As to the obligation of the warehouse-man to deliver the goods to the consignee, or redeliver them to the consignor, in the case where they are claimed by another as the proper owner who forbids such delivery, there seems to be some uncertainty. (z) * We take the law to be, however, that he must decide for himself which is the better right, and is exposed to loss if he decide it wrongly. But if he deliver it to the original bailor, or his consignee, the true owner should not recover damages from him by merely proving his ownership and a notice to the warehouse-man, nor unless he exhibit to the warehouse-man such proofs as might reasonably be required of his ownership. And if on such evidence he did deliver the goods to the person claiming to be owner, and it appeared afterwards that the claim was unfounded, the original bailor should be limited in his recovery to the strictest compensation, if the warehouse-man could show that he acted on evidence which would satisfy a cautious and honest man. In practice it is usual in such cases to demand and receive an indemnity from the party put in possession of the goods.

In an action against a warehouse-man to recover the value

it is no defence that they are afterwards injured by falling into the street from the breaking of the tackle, even if the carman who brought them has refused the offer of slings for further security. *Thomas v. Day*, 4 Esp. 262.

(z) In *Ogle v. Atkinson*, 5 Taunt. 759, it was decided that a warehouse-man, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to re-deliver them, if they are the property of another. But several subsequent cases have established that a warehouse-man cannot dispute the title of his bailor, or of any other person whose title he has acknowledged, in an action brought against him by such person. See *Gosling v. Birnie*, 7 Bing. 339; *Holl v. Griffin*, 10 Bing. 246; *Kieran v. Sandars*, 6 Ad. & El. 515; *Harman v. Anderson*, 2 Camp. 243; *Stonard v. Dunkin*, Id. 344; *Burton v. Wilkinson*, 18 Verm. 186. In the late case, however, of *Cheesman v. Excell*, 4 E. L. & E. 438, where property had been delivered by the plaintiff to the de-

fendant for the purpose of defeating an execution against the plaintiff, it was held that in the present action of trover the defendant might set up the title of a previous transferee of the plaintiff to defeat the plaintiff's right to recover, and the court refer to *Ogle v. Atkinson* as in point. The court are inclined to the opinion that in the case of a pledge the pledgee may set up the *jus tertii* unless he has made an absolute agreement to give up the property to the party pledging it. See also *Bates v. Stanton*, 1 Duer, 79; *Pitt v. Albritton*, 12 Ire. L. 77. So if a warehouse-man delivers the goods intrusted to him to a wrong person by mistake, or they are obtained from him by fraud, as by a forged order, he is liable to his bailor for their value. *Lubbock v. Inglis*, 1 Stark. 104; *Willard v. Bridge*, 4 Barb. 361. On the other hand, if the goods are taken from the possession of the warehouse-man by the authority of the law, this constitutes a good defence for him in an action brought against him by his bailor. *Burton v. Wilkinson*, 18 Verm. 186.

of lost baggage, the owner has been admitted to prove the contents, in the same way as in a similar action against a common-carrier; but this privilege is strictly confined to the ordinary baggage of a traveller. (*a*)

WHARFINGERS. This kind of bailment is quite similar to that first spoken of, and the rules of law applicable to it are much the same. (*b*)

It has been somewhat questioned whether, in the case of depositaries for hire, and loss or injury to the goods, the law casts the burden of proving negligence on the owner, or that of proving due care and the absence of negligence on the depositary. We have considered this point in a previous note, (*c*) and the cases there cited show that the decided weight of authority is in favor of requiring proof of negligence, on the ground that the law will not intend any wrong-doing. But there have been opposite decisions; and courts which adopt this rule sometimes regret its existence.

The wharfinger has a lien on vessel and goods for his wharfage. (*d*)

POSTMASTERS might be regarded as depositaries for a compensation, or as carriers; and as common-carriers, because they are obliged to carry for all. But they are also public officers; receiving their appointments and their compensation from the State, which alone regulates and directs their duties. Hence they come under a different obligation and liability from that of ordinary common-carriers. The postmaster-general is not liable for loss, although it be caused by the negligence of his servants. The law was so established in Lord *Holt's* time, though against his opinion, in the case of *Lane v. Cotton*; (*e*) and that case has been considered as law ever since. (*f*) But it should seem, from general prin-

(*a*) *Clark v. Spence*, 10 Watts, 335.

(*b*) *Platt v. Hibbard*, 7 Cow. 497, 502, n. *b*; *Sidaways v. Todd*, 2 Stark. 400; *Foote v. Storrs*, 2 Barb. 326. It has sometimes been inferred from the cases of *Ross v. Johnson*, 5 Burr. 2825, and *Maving v. Todd*, 1 Stark. 72, that the rule as to the liability of wharfingers was different from what we have stated, and that they are held to the same degree of responsibility as common-car-

riers. But it is very doubtful whether those cases justify such an inference; and if they do, they cannot now be considered as law.

(*c*) See *ante*, p. 606, n. (*u*).

(*d*) *Johnson v. The Schooner McDonough*, Gilpin, 101; *Lewis, ex parte*, 2 Gall. 483.

(*e*) 1 *Ld. Raym.* 646, 12 *Mod.* 472.

(*f*) *Whitfield v. LeDespencer*, Cowp. 754; *Schroyer v. Lynch*, 8 Watts, 453;

ciples, that if such servant were wholly incompetent, and the knowledge of the incompetency were brought home to the postmaster-general, this should make him responsible; and if it could be shown that the servant was appointed or retained from unworthy motives after such knowledge, the postmaster-general ought certainly to be held liable. (g) His deputies are not liable except for loss caused by their own fault or negligence; but for this it is clear that they are liable. (h) This negligence may be in appointing unfit persons to subordinate offices, or in not using due precautions to secure their good conduct; for each deputy postmaster is bound to exercise due care in such appointments, and due watchfulness over the conduct of his subordinates. (i) And *it would seem that the postmaster-general should be held to some measure of the same obligation.

INNKEEPERS. An inn has been judicially defined as "a house where the traveller is furnished with every thing which he has occasion for whilst upon his way." (j) There need not be a sign to make it an inn. (k) But a mere coffee-house, (l) or eating-room, or boarding-house, (m) is not an inn. (n)

Supervisors of Albany Co. v. Dorr, 25 Wend. 440, per *Nelson, C. J.*; *Wiggins v. Hathaway*, 6 Barb. 632; *Martin v. The Mayor &c. of Brooklyn*, 1 Hill, 545, per *Cowen, J.* See also *Dunlop v. Munroe*, 7 Cranch, 242. And in *Cornwell v. Voorhees*, 13 Ohio, 523, the same rule was applied to a mail contractor. Therefore, where money transmitted by mail was lost by the carelessness of the contractors' agents who carried the mail, the court held that the contractors were not liable. The case of *Hutchins v. Brackett*, 2 Foster, 252, is to the same effect.

(g) See authorities cited *infra*, n. (i.)

(h) *Whitfield v. Le Despencer*, Cowp. 754; *Rowning v. Goodchild*, 3 Wils. 443; *Maxwell v. McIlvoy*, 2 Bibb, 211; *Christy v. Smith*, 23 Verm. 663. See also *Bolan v. Williamson*, 2 Bay, 551, 1 Brev. 181.

(i) *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632; *Christy v. Smith*, 23 Verm. 663. And in *Bishop v. Williamson*, 2 Fairf. 495, this rule was applied to a case where a

deputy postmaster had employed an assistant without having an oath administered to him, as was required by the Statute of the United States. Accordingly, where such assistant wrongfully refused to deliver a letter to the plaintiff, his employer was held liable in damages. See also *Bolan v. Williamson*, 1 Brev. 181.

(j) Per *Bayley, J.*, in *Thompson v. Lacy*, 3 B. & Ald. 283, 286.

(k) Bac. Abr. tit. Inns and Innkeepers, (B.) "A sign is not essential to an inn, but is an evidence of it." Per *Holt, C. J.*, in *Parker v. Flint*, 12 Mod. 254.

(l) *Doe d. Pitt v. Laming*, 4 Camp. 73.

(m) This was directly held by *Erle, J.*, in *Dancey v. Richardson*, 20 Law Times Rep. 213.

(n) So one who entertains strangers occasionally, although he receives compensation for it, is not an innkeeper. *State v. Mathews*, 2 Dev. & Bat. 424; *Lyon v. Smith*, 1 Morris, [Iowa,] 184. So it has been held that a housekeeper at Tunbridge or Epsom, or other wa-

Public policy imposes upon an innkeeper a severe liability. The latter, and on the whole, prevailing authorities, make him an insurer of the property committed to his care, against every thing but the act of God, or the public enemy, or the neglect or fraud of the owner of the property. (n) He would then be liable for a loss occasioned by his own servants, by other guests,

tering place, who lets lodgings, and furnishes meat and drink, and provides stable room, for the company who resort there for health or pleasure, is not an innkeeper. *Parkhouse v. Forster*, 5 Mod. 427; s. c. *nom. Parkhurst v. Foster*, Carth. 417, 1 Salk. 387. And Lord Holt said the case was so plain that there was no occasion for giving reasons. See also *Bonner v. Welborn*, 7 Geo. 296. But in *Thompson v. Lacy*, 3 B. & Ald. 283, it was held that a house of public entertainment in London, where beds, provisions, &c., were furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage coaches and wagons from the country, and which had no stables belonging to it, was to be considered as an inn, and the owner was subject to the liabilities of innkeepers, and had a lien on the goods of his guest for the payment of his bill, and that too even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London. In *Wintermute v. Clarke*, 5 Sandf. 247, the court say that in order to charge a party as an innkeeper it is not necessary to prove that it was only for the reception of travellers that his house was kept open, it being sufficient to prove that all who came were received as guests without any previous agreement as to the time or terms of their stay. A public house of entertainment for all who choose to visit it is the true definition of an inn.

(n) *Mason v. Thompson*, 9 Pick. 280, per *Wilde, J.*; *Richmond v. Smith*, 8 B. & C. 9, per *Bayley, J.*; *Piper v. Manny*, 21 Wend. 282, per *Nelson, C. J.*; *Grinnell v. Cook*, 3 Hill, 485, per *Bronson, J.*; *Manning v. Wells*, 9 Humph. 746; *Thickstun v. Howard*, 8 Blackf. 535; *Mateer v. Brown*, 1 Calaf. 221; *Shaw v. Berry*, 31 Maine, 478. This last was an action on the case against the defendant, who was an innkeeper, for an injury to the plaintiff's

horse, while at the defendant's stable. The horse was placed at the stable in the evening, and the next morning one of his hind legs was found to have been broken above the gambrel joint. The evidence tended to show, that he was treated with care and faithfulness; that he was placed in a safe and suitable stall, with sufficient and suitable bedding; and that the injury happened without the fault of any one. The learned judge, before whom the cause was tried, instructed the jury, that the rule of law applicable to common carriers was not applicable to innholders; that the law, in case of injury to goods or property while in the custody of the innkeeper, presumed it to have happened through his negligence or fault, and would hold him responsible for it, unless he could prove that he was guilty of no fault; and that if the defendant had proved that he was not in fault, the action could not be maintained. The case was carried up to the Supreme Court on exception to these instructions, and that court, after an elaborate examination of the authorities, held the instructions to be incorrect; and declared the rule of law to be, that an innkeeper is bound to keep the goods and chattels of his guest so that they shall be actually safe; inevitable accidents, the acts of public enemies, the owners of the goods and their servants, excepted; and that proof that there was no negligence in the innkeeper or his servants was not sufficient for his immunity. It must be confessed, however, that two recent and well-considered cases adopt a different rule on this subject from that stated in the text, and supported by the authorities just cited. We allude to *Dawson v. Chamney*, 5 Q. B. 164, and *Merritt v. Claghorn*, 23 Verm. 177. *Dawson v. Chamney* was an action on the case to recover damages for an injury to the plaintiff's horse. It appeared that the defendant was an innkeeper; that the plaintiff gave the horse in charge to the defendant's ost-

by robbery or burglary from without the house, or by rioters or mobs. Nor will it excuse him, if he were sick, insane, or

ler, who placed him in a stall where there was another horse; and that the injury was done by the other horse kicking the horse of the plaintiff. The defendant having called witnesses to show that proper care had been taken of the horse, the learned judge directed the jury to find for the plaintiff, if they were of opinion that the defendant, by himself or servants, had been guilty of direct injury, or of negligence, but otherwise for the defendant. The jury found a verdict for the defendant, and the Court of Queen's Bench held the direction proper. This decision was considered in the case of *Mateer v. Brown*, 1 Calaf. 221. The court adopt the dictum of Mr. Justice *Bayley* in *Richmond v. Smith*, 8 B. & C. 9, that the innkeeper very closely resembles a common-carrier and is liable for any loss not occasioned by the act of God or the king's enemies, except where the guest chooses to have the goods under his own care; and after a lengthy and able consideration of the subject they say that although that dictum of Mr. Justice *Bayley*'s has been overturned in England by the decision of *Dawson v. Chamney*, they think the dictum right and the decision wrong. The case of *Merritt v. Claghorn* was also an action on the case to recover the value of two horses, a double harness, two horse blankets, and two halters. On the trial, it was conceded that the defendant was the keeper of an inn, and that the agent of the plaintiff was received as a guest at the defendant's inn, with the property in question, belonging to the plaintiff; and that the horses and other property were, as is usual in such cases, put into the barn of the defendant, which was a part of the premises, and, at the same time for closing the stable, the door was locked by the defendant; and that about daylight the next morning, and while the property was thus in the custody of the defendant, as an innkeeper, the barn was discovered to be on fire, supposed to be the work of an incendiary, and the horses and other property were burned and destroyed; and that there was no negligence, in point of fact, in the defendant or his servants, in the case of the barn and of the property in question. On these facts,

the court held that the plaintiff was not entitled to recover. And *Redfield, J.*, in giving the opinion of the court, said:—"The case finds that the plaintiff's loss was without any negligence, in point of fact, in the defendant or his servants. From this we are to understand that no degree of diligence on his part could have prevented the loss. If, then, the defendant is liable, it must be for a loss happening by a cause beyond his control. In saying this we have reference only to the highest degree of what would be esteemed reasonable diligence, under the circumstances known to exist, before the fire occurred. We are aware that it would doubtless have been possible, by human means, to have so vigilantly guarded these buildings as probably to have prevented the fire. But such extreme caution in remote country towns is not expected, and if practised, as a general thing, must very considerably increase charges upon guests, which they would not wish to incur, ordinarily, for the remote and possible advantage which might accrue to them. The question, then, is. Whether the defendant is liable? Do the authorities justify any such conclusion? For it is a question of authority merely. We know that many eminent judges and writers upon the law have considered that innkeepers are liable to the same extent as common-carriers. It may be true, that the cases are much alike in principle. For one, I should not be inclined to question that. But if the case were new, it is certainly not free from question how far any court would feel justified in holding any bailee liable for a loss like the present. But in regard to common-carriers, the law is perfectly well settled, and they contract with the full knowledge of the extent of their liability, and demand not only pay for the freight, but a premium for the insurance, and may re-insure, if they choose. And the fact that carriers are thus liable no doubt often induces the owners to omit insurance. But, unless the law has already affixed the same degree of extreme liability to the case of innkeepers, we know of no grounds of policy merely which would justify a court in so holding." After a careful examination of the authorities,

absent at the time; for he is bound to have competent servants and agents. (o)

But it is a good defence that the loss was caused by the servant of the owner, (p) or by one who came with him as his companion, (q) or by the negligence of the owner; (r) or that the owner retained personally and exclusively the *custody of his goods. (s) It is not enough for this, however,

the learned judge concludes:—"It is certain no well considered case has held the innkeeper liable in circumstances like the present. And no principle of reason, or policy, or justice, requires, we think, any such result, and the English law is certainly settled otherwise." See also *Metcalf v. Hess*, 14 Ill. 129.

(o) *Cross v. Andrews*, Cro. Eliz. 622.

(p) *Caule's case*, 8 Co. Rep. 32.

(q) *Ibid.*

(r) *Burgess v. Clements*, 4 M. & S. 306; *Armistead v. White*, 6 E. L. & E. 349. This last was an action on the case for the loss of money, which the plaintiff brought with him to the defendant's inn. On the trial, it appeared that the plaintiff was a commercial traveller, who had frequented the defendant's inn for twenty years. On the evening of the night in which the money was stolen from the plaintiff's driving box, he had opened the box and counted over the bank notes in the presence of many persons in the commercial room, as he had also done on several days before, and after replacing them in the box he left it in that room all night, as he had been accustomed to do; it was the custom of travellers to leave their driving boxes in the commercial room during the night. The box was so insecurely fastened that it might be opened without a key, by pushing back the lock. The learned judge, in summing up to the jury, said that by the custom of England an innkeeper was bound to keep the goods of his guest safely; but that a guest might, by gross negligence, relieve the innkeeper from his liability; and that if they thought that a prudent man would have taken the box with him to his bedroom, or given it into the express custody of the defendant, they might find a verdict for the defendant; and left it as a question for them whether the plaintiff was guilty of gross negligence in the traveller's

room, or whether they were satisfied on the evidence that the plaintiff had acted with ordinary caution. The jury found a verdict for the defendant. And a rule having been obtained for a new trial, on the ground of misdirection, Lord Campbell, C. J., said:—"I am of opinion that the rule should be discharged. If the judge had intimated that it was the duty of the plaintiff to withdraw the box from the commercial room, and carry it with him into his bed chamber, and that, not having done so, he had lost his claim upon the defendant, that would have been a misdirection. But there is no misdirection in what he has reported to us. It must be taken that he left the question to the jury under all the circumstances of the case; and it is not possible to say, as a matter of law, that a traveller might not be guilty of negligence, under some circumstances, in leaving a box containing money in the commercial room; and in this case I think that there was strong evidence from which the jury were justified in finding that the plaintiff was guilty of gross negligence. Indeed, it is questionable whether the direction was not too favorable for the plaintiff, because it is doubtful whether, in order to relieve the innkeeper from his liability, there must be *crassa negligentia* in the guest."

(s) *Farnworth et al. assignees of Kirton, a bankrupt, v. Packwood*, 1 Stark. 249. It appeared in this case that Kirton came to the house of the defendant, an innkeeper, and in the course of three or four days afterwards applied to the defendant for a private room, for the purpose of depositing goods there, and exposing them for sale; and the defendant having shown him a small room, which he approved of, Kirton the next day took possession of it, and the key was delivered to him, and was kept by him exclusively for several days; but, upon the defendant's wife request-

that he exercised some choice as to the room where they should be placed, (t) or that the key of the room was delivered to him. (u) The owner may still recover, even if he does not use the key, but leaves the door unlocked. (v) But an innkeeper may require of his guest to place his goods in a particular place, and under lock and key, or he will not be answerable. And if these precautions are reasonable, and the guest neglects them, *and exposes the goods to a greater hazard, the innkeeper is exonerated. (w)

No especial delivery or direction of the goods to the innkeeper is necessary to charge him; for it is enough if

ing to place some parcels in the same room, Kirton permitted her to use the key, and he had not the exclusive use of it, and other parcels were deposited in the same room. Kirton boarded and lodged in the house for almost a fortnight, and from time to time introduced his customers into the room. A short time before he left the house he discovered that a package was missing, which made the subject of the present demand. *Le Blanc, J.*, in summing up to the jury, said:—"If a guest take upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss. The only question in this case is, whether Kirton did not take upon himself the exclusive charge of his goods, to the exclusion of every other person? A landlord is not bound to furnish a shop to every guest who comes into his house; and if a guest takes exclusive possession of a room, which he uses as a warehouse or shop, he discharges the landlord from his common-law liability. The question, therefore, for your consideration, is, whether, when the goods were lost, they were exclusively in Kirton's possession? It is admitted that during part of the time Kirton kept the key; if afterwards the defendant took the key from him, the goods then ceased to be under his exclusive control, and the defendant became liable for their safe custody. The only question is whether, at the time of the loss, the goods were in the exclusive possession of Kirton?" The jury found a verdict for the defendant. See also *Burgess v. Clements*, 4 M. &

S. 306. The same rule holds where the guest, instead of reposing himself upon the protection of the innkeeper, intrusts his property to some one else in the house. *Sneider v. Geiss*, 1 Yeates, 34.

(t) Thus, where a traveller went into an inn, and desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen, the court held that the innkeeper was responsible, although he proved that, according to the usual practice of his house, the luggage would have been deposited in the guest's bedroom, and not in the commercial room, if no order had been given respecting it. *Richmond v. Smith*, 8 B. & Cr. 9.

(u) Anonymous, Moore, 78, pl. 207; *Calye's case*, 8 Co. Rep. 32. In the case of *Burgess v. Clements*, 4 M. & S. 306, Lord *Ellenborough* says:—"I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But if there be evidence that the guest accepted the key, and took on himself the care of his goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely, because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room."

(v) *Calye's case*, 8 Co. Rep. 32.

(w) *Sanders v. Spencer, Dyer*, 266 b; *Calye's case*, 8 Co. Rep. 32.

they are fairly, according to common practice, within his custody. (x)

It is said that if the innkeeper refuses to receive the party as a guest, he is not liable for any loss of his goods. But he cannot so refuse, unless his house is full, and he is actually unable to receive him. (y) And if on false pretences he refuses, he is liable to an action. (z) And it is said that he may even be indicted therefor. (a)

An innkeeper may refuse to receive a disorderly guest, or require him to leave his house. (b) He is not bound to examine into the reasonableness of the guest's requirements, if the guest be possessed of his reason, and is not a minor. (c) And while travellers are entitled to proper accommodation, they have no right to select a particular apartment, or use it for purposes other than those for which it is designed. (d) But an innkeeper has no right to prevent the driver of a line that is a rival to one which favors the innkeeper, from entering his house for lawful and reasonable purposes. (e)

Nothing need be, nor usually is, paid for the goods separately. (f) The compensation paid by the owner for his entertainment covers the care of the property. The custody of the goods is accessory to the principal contract.

It is sometimes difficult to know who is the guest of an innkeeper. (g) In this country it is very common for persons

(x) *McDonald v. Edgerton*, 5 Barb. 560; *Bennet v. Mellor*, 5 T. R. 273. Nor is it material whether the property intrusted to the innkeeper consists of goods or of money. *Kent v. Shuckard*, 2 B. & Ad. 803. Nor is it limited to any particular amount. *Berkshire Woollen Co. v. Proctor*, 5 Law Rep. N. S. 378; s. c. 7 Cush. 417. See the facts of this case stated *post*, p. 628, n. (i.) *Fletcher, J.*, in reference to this point, says:—"The responsibility of innkeepers for the safety of the goods and chattels and money of their guests, is founded on the great principle of public utility, and is not restricted to any particular or limited amount. . . . The principle for which the defendants contend, that innkeepers are liable for such sums only as are necessary and designed for the ordinary travelling expenses of the guest, is

unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests."

(y) *Hawthorn v. Hammond*, 1 Car. & Kir. 404; *Kirkman v. Shawcross*, 6 T. R. 14.

(z) *White's case*, Dyer, 158 b, 1 Rol. Abr. 3, (F.) pl. 1.

(a) *Rex v. Ivens*, 7 C. & P. 213.

(b) *Howell v. Jackson*, 6 C. & P. 723
Rex v. Ivens, 7 C. & P. 213.

(c) *Proctor v. Nicholson*, 7 C. & P. 67.

(d) *Fell v. Knight*, 8 M. & W. 269.

(e) *Markham v. Brown*, 8 N. Hamp. 523.

(f) *Lane v. Cotton*, 12 Mod. 472, 487.

(g) Purchasing liquor at an inn has been held sufficient to constitute one a guest. *Bennet v. Mellor*, 5 T. R. 273.

to become boarders at an inn; and then they cease to be guests in such a sense as to hold the innkeeper to his peculiar liability, and, on the other hand, give him his lien. (*h*) We take the distinction between the guest and the boarder to be this. The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and it is not enough to make him a boarder, and not a guest, that he has staid a long time in the inn, in this way. This we hold to be the general rule; but there may be some difficulty in the application of it; for, on the one hand, the special contract between the boarder and the master of the house may be express or implied, and a length of residence, upon certain terms, might certainly be one circumstance, which, with others, might lead to the inference of such a contract. On the other hand, if a traveller on a journey stops at an inn for three days, and makes a bargain for that time, it would be difficult to say that he thereby ceased to be a guest, and that the innkeeper was exonerated from liability as such. (*i*) This question must always be one of mixed law and fact.

In this case the plaintiff's servant had taken some goods to market at Manchester, and not being able to dispose of them, went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the following week, and she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him, and when he got up, after sitting there a little while, the goods were missing. There was a verdict for the plaintiff for the value of the goods; and, on a motion for a new trial, the Court of King's Bench sustained the verdict, deciding that the plaintiff's servant was to be deemed the guest of the defendant. See also *McDonald v. Edgerton*, 5 Barb. 560; *Washburn v. Jones*, 14 Barb. 193. Nor is it necessary that the owner of the goods be himself a guest, in order to entitle him to an action against an innkeeper. If his servant or friend to whom he has intrusted the possession of the goods is a guest, it is sufficient.

Mason v. Thompson, 9 Pick. 280; *Towson v. Havre-de-Grace Bank*, 6 Har. & Johns. 47; *Berkshire Woollen Co. v. Proctor*, 5 Law Rep. N. S. 378; s. c. 7 Cush. 417; *Washburn v. Jones*, 14 Barb. 193.

(*h*) *Manning v. Wells*, 9 Humph. 746.

(*i*) This question has been recently discussed in the Supreme Judicial Court of Massachusetts, in the case of the *Berkshire Woollen Co. v. Proctor et al.* 5 Law Rep. N. S. 378; s. c. 7 Cush. 417. In that case, one Russell, the agent and servant of the plaintiff, a corporation, came to Boston with a large number of witnesses, to take charge of a lawsuit in behalf of the corporation, bringing with him one thousand dollars to defray the expenses of the suit, and put up at defendants' inn as a guest, with several of the witnesses, for whose board he promised to be responsible to the defendants, but at an agreed price for board by the week, — the price to be greater if they did not stay a week, — and under said agreement staid at defendants' inn

Another question has arisen; whether he is a guest who only sends or carries his property to an inn, and places it in the custody of the innkeeper, but does not go there himself, to eat or to lodge. Upon this question the authorities are directly antagonistic; (*j*) but we think that such person is not a guest, and that the innkeeper is then only a depositary for compensation, and liable as such. We think the test is this. Is he bound to receive and to keep goods so sent or brought to him? He is certainly bound to receive them—if not unreasonable in quantity, or dangerous in quality—if the guest comes and stays with them; and then insures them as above stated. But we think he may refuse to take charge of them if the owner does not accompany them; for the custody of the goods, as we have already said, is merely accessory to the principal contract. He may refuse them, and

for eighteen days. It was held that the relation of landlord and guest was established instantly upon his arrival at the inn, and his reception as a guest, and was not affected by his staying for a longer or shorter time, if he retained his character as a traveller, and the fact that there was an agreed price for board would not take away his character as a traveller and guest. And *Fletcher, J.*, said:—"It is maintained for the defendants that Russell was not a guest, in the sense of the law, but a boarder. But Russell surely came to the defendant's inn as a wayfaring man and a traveller, and the defendants received him, as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants as their guest at their inn, the relation, with all the rights and liabilities of the relation of landlord and guest, was instantly established between them. The length of time that a man is at an inn makes no difference, whether he stays a week or a month, or longer, so that always though not strictly *transiens*, he retains his character as a traveller. Story on Bailm. § 477. The simple fact that Russell made an agreement, as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and a guest. A guest for a single night might make a special contract as to the price to be paid for his lodging, and whether it were more or

less than the usual price would not affect his character as a guest. The character of a guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or a guest, in the sense of the law. But Russell was a traveller, and put up at defendants' inn as a guest, was received by the defendants as a guest, and was, in the sense of the law, and in every sense, a guest."

(*j*) This question was decided in the affirmative by a majority of the judges, against the opinion of Lord *Holt*, in *Yorke v. Grenaugh*, 2 Ld. Raym. 866; s. c. *nom.* *York v. Grindstone*, 1 Salk. 388. And on the authority of this case, it was decided the same way in *Mason v. Thompson*, 9 Pick. 280. See also the case of *Peet v. McGraw*, 25 Wend. 653, which contains a *dictum* by *Nelson, C. J.*, to the same effect; and *Berkshire Woollen Co. v. Proctor*, 5 Law Rep. N. S. 378, s. c. 7 Cush. 417, in which the point is noticed, but no opinion given. On the other hand, in *Grinnell v. Cook*, 3 Hill, 485, the Supreme Court of New York, after much consideration, decided the same question the other way, conformably to the opinion of Lord *Holt*. See also *Thickstun v. Howard*, 8 Blackf. 535, to the same effect. See also *Smith v. Dearlove*, *post*, p. 632, n. (*u.*)

therefore if he receives them it is not as an innkeeper, or at least not so as to subject him to the peculiar liability of an innkeeper. It is quite certain that he is not answerable for goods left by the owner, for which he is to receive no compensation. (*k*) A guest undoubtedly may leave an inn for a time, and still leave his property under the safeguard of the landlord's liability. And it is impossible to say precisely how long he may so leave it, without ceasing to be a guest. On the other hand, it must be certain that one cannot lodge for a day or two at an inn, and then depart, leaving valuable property for an indefinite period, and the landlord be subjected, as long as the owner pleases, to the peculiar liability of an innkeeper. In such case he would be like a warehousman, or other depositary, liable only for his negligence. (*l*)

(*k*) *Yorke v. Grenaugh*, 2 Ld. Raym. 866; s. c., *nom.* *York v. Grindstone*, 1 Salk. 388.

(*l*) In the case of *Gelley v. Clerk*, Cro. Jac. 188, it appeared that the plaintiff, being a guest at the house of the defendant, who was an innkeeper at Uxbridge, went from thence to London, and left his goods with the defendant, saying that he would return within two or three days. He returned accordingly within the three days, and in the mean time his goods had been stolen. Upon these facts, *Foster*, Sergeant, for the plaintiff, contended that the innkeeper should be charged. "For when the plaintiff was a guest, and left his goods for so short a time, and promised to return so soon, and returned accordingly, he is all that time accounted as a guest, and shall be said to be a guest, to charge the defendant as an innkeeper, according to the custom of the realm. And it was adjudged in the case of *Sir Edwyn Sands*, where he came to an inn and lodged, and went out thereof in the morning and left his cloak-bag there, intending to return at night, and at night returned accordingly, and in the interim his cloak-bag was stolen, that he might have his remedy by an action grounded upon the common custom: so here, &c." *Sed non allocatur*; for per *Williams, J.*:—"If one come to an inn and leave his goods and horses, and go into the town, and after returns, and in the interim his goods are stolen, no

doubt but he is a guest, and shall have remedy, and so was *Sir Edwyn Sands's* case; for his absence in part of the day is not material, but he is always reputed as a guest. So where one leaves his horse at an inn, to stand there by agreement at livery, although neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration; and if that horse be stolen, he is chargeable with an action upon the custom of the realm. But, as in the case at the bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at his liberty, and therefore he is not a guest during that time." The distinctions taken in this case have been recognized substantially in several subsequent cases. See *Grinnell v. Cook*, 3 Hill, 485; *McDonald v. Edgerton*, 5 Barb, 560; *Towson v. Havre-de-Grace Bank*, 6 H. & Johns. 47. See, however, *ante*, p. 629, n. (*j*), that what *Williams, J.*, says in regard to leaving a horse at an inn must be confined to those cases where the owner is himself a guest at the time of so leaving the horse. In *Wintermute v. Clarke*, 5 Sandf. 242, the plaintiff's son went to the tavern of the defendant with his baggage, which he left there. The next morning he paid his bill for his lodgings, leaving, as was contended, his trunk at the inn. Upon the testimony

Innkeepers are liable only for goods brought within the inn, or otherwise placed distinctly within their custody, in some customary and reasonable way. (*m*) Where a horse or carriage is put in an open shed, or the horse put for the night into a pasture by the innkeeper, without the consent of the owner, he is still liable; (*n*) but it is otherwise if it is done with the owner's consent, or by his directions; (*o*) and where this is usually done, and the owner knows the custom, and gives no particular direction, it might be presumed that he consented, and took the risk upon himself. (*p*)

the judge charged the jury that if they believed the trunk had been taken away by any other person than the plaintiff's son, even after the plaintiff had paid his bill, the defendant was liable. The verdict of the jury for the plaintiff was set aside, and a new trial granted, on the ground that after a guest pays his bill and leaves the house, it is at his own peril that he leaves his property behind him, and that the innkeeper has a right to believe that he takes it with him, and is therefore no longer responsible for it, unless it is specially committed to his charge, and then only as ordinary bailee.

(*m*) *Simon v. Miller*, 7 Louis. Ann. 360; *Albin v. Presby*, 8 N. H. 408, cited *post*, n. (*p*.) But in *Clute v. Wiggins*, 14 Johns. 175, where a sleigh loaded with bags of wheat and barley was put by the guest into an outhouse appurtenant to the inn, where loads of that description were usually received, and the grain was stolen during the night, the innkeeper was held responsible for the loss, the court holding that the grain was *infra hospitium*.

(*n*) *Calye's case*, 8 Co. Rep. 32; *Piper v. Manny*, 21 Wend. 282; *Mason v. Thompson*, 9 Pick. 280. And where an innkeeper on the day of a fair, upon being asked by a traveller, then driving a gig of which he was owner, "whether he had room for the horse?" put the horse into the stable of the inn, received the traveller with some goods into the inn, and placed the gig in the open street without the inn yard, where he was accustomed to place the carriages of his guests on fair days; and the gig was stolen from thence; the court held that the innkeeper was answerable. *Jones v. Tyler*, 1 A. & E. 522; 3 Nev. & Man. 576.

(*o*) *Calye's case*, 8 Co. Rep. 32. In

Hawley v. Smith, 25 Wend. 642, it appeared that the defendant was an innkeeper, and that the plaintiff stopped at his house with a drove of 700 sheep, which, with his knowledge, were turned out to pasture. On the following day several of the sheep died, and others sickened, in consequence of having eaten *laurel*, which they found in the pasture. A verdict having been found for the plaintiff, upon these facts, under the direction of the judge, the Supreme Court granted a new trial for a misdirection. And *Nelson, C. J.*, said:—"I am of opinion this case falls within an exception laid down in *Calye's case*, 8 Co. Rep. 32, to the general rule in respect to the liability of an innkeeper, which has been followed ever since. It was there resolved, that if the guest deliver his horse to the hostler, and request that he be put to pasture, which is accordingly done, and the horse is stolen, the innholder is not responsible, not being, in the common-law sense of the term, *infra hospitium*. He is not to be regarded as an insurer for goods without the inn, that is for goods not within the curtilage. The sheep were put to pasture under the direction of the guest, which fact should have been regarded by the learned judge as bringing the case within the above exception. It would then have turned upon the question of negligence, which should have been put to the jury upon the facts disclosed."

(*p*) Thus in *Albin v. Presby*, 8 N. H. 408, where a traveller, after arriving at an inn, placed his loaded wagon under an open shed, near the highway, and made no request to the innkeeper to take the custody of it, and goods were stolen from it in the night; it was held that the innkeeper was not liable for

An innkeeper has a lien on the property of the guest (not on his person) (*q*) for the price of his entertainment. (*r*) He has this lien on a horse even if it be stolen, and the thief brings it to him. (*s*) But it is not quite certain, on the authorities, how far this lien of the innkeeper extends. (*t*) Upon the whole, it seems that he has it on all the goods of the guest which he has received, excepting only those actually worn by him on his person, and that this lien covers the whole amount due for the entertainment of the guest, or his servant or horse. (*u*)

the loss, notwithstanding it was usual to place loaded teams in that place. And *Parker, J.*, said:—"The present case finds, to be sure, that the wagon was put in the place where loaded wagons of guests were usually placed, when they were put under shelter; but they were doubtless usually so placed, with the knowledge and assent of the guests. It is well known that loaded wagons are often left within the limits of the highway near the inn, and are usually not placed in any building or inclosed yard, unless there is a special request for it. Few inns in the country have suitable accommodations for securing property of this character in such a manner. In the present case, there is not only knowledge and assent, but the plaintiff himself places the wagon in that situation. He of course could not have expected that it would be removed to another place—he made no request to that effect—and he must have known that the goods could not be secured from thieves in that place, except by a watch. Assuredly he could not have expected they would be guarded by the defendant, in that manner; and under such circumstances, ought not to have expected that the defendant was to be responsible for a loss. And as the inns in this country are not generally furnished with accommodations for the protection of the carriages of all guests who may lodge at the inn, and the custom of permitting them to remain in open yards, where they cannot be protected but by a guard, is so universal and well known, we think it a sound position that the assent of the traveller is to be presumed in such case, unless he makes a special request that his carriage should be put in a safe place; and that such open yard

is not to be deemed a part of the inn, so as to charge the innkeeper for the loss, unless he neglects, upon request, to put the goods in a place of safety, which he is bound to do, on such request, if he have any accommodations which enable him to comply with it." See *Clute v. Wiggins*, 14 Johns. 175, cited *ante*, p. 631, n. (*m*.)

(*q*) *Sunbolf v. Alford*, 3 M. & W. 248.

(*r*) *Robinson v. Walter*, Poph. 127, 3 Bulst. 269; *Johnson v. Hill*, 3 Stark. 172; *Grinnell v. Cook*, 3 Hill, 485.

(*s*) *Jones v. Thurloe*, 8 Mod. 172. And where the guest brings to the inn a carriage not his own, for the standing room of which the innkeeper acquires a claim, for this he has a lien and may defend against an action of trover brought by the owner of the carriage. *Turrill v. Crawley*, 13 Q. B. 197.

(*t*) In *Bac. Abr. tit. Inns and Innkeepers*, (D.) it is said:—"If a horse be committed to an innkeeper, it may be detained for the meat of the horse, but not for the meat of the guest; for the chattels are only in the custody of the law for the debt that arises from the thing itself, and not for any other debt due from the same party; for the law is open to all such debts, and doth not admit private persons to make reprisals." See also *Rosse v. Bramsted*, 2 Rol. Rep. 438.

(*u*) See *Thompson v. Lacy*, 3 B. & Ald. 283; *Proctor v. Nicholson*, 7 C. & P. 67. But where an innkeeper receives horses and a carriage to stand at livery, the circumstance of the owner, at a subsequent period, taking occasional refreshment at the inn, or sending a friend to be lodged there at his charge, will not entitle the innkeeper to a lien in respect of any part of his demand. For the right of lien of an innkeeper, say

LOCATIO OPERIS MERCIUM VEHENDARUM. The owner of goods may cause them to be carried by a private carrier gratuitously, or by a private carrier for hire, or by a common carrier. Any one who carries goods for another is a private *carrier, unless he comes within the definition of the common carrier which we shall give presently. If the private carrier carries them gratuitously, he is a mandatary, and is bound only to slight diligence, and liable only for gross negligence; because this bailment is wholly for the benefit of the bailor.

A carrier, like any mandatary, has a special property so far as to maintain an action for a tort to the thing while in his possession; but not, it seems, if it went out of his possession by his own wrongful disregard of the directions of the bailor. (v) And if he incur expenses in relation to it, he would have a lien on the article for them.

The private carrier for hire is bound to ordinary diligence, and liable for ordinary negligence, because this bailment is for the benefit of both bailor and bailee. He is of course not liable for a loss caused by robbery or theft, which could not be avoided by ordinary care, or for one from overpowering force. But he is liable for the negligence of his servants or agents. (w) It is not necessary that the owner should promise to pay the carrier a certain price, in order to hold him to this liability; for it is enough if the carrier is entitled to a reasonable compensation. By the civil law, robbery by force was a sufficient defence for the bailee, but if the goods were lost by secret purloining, he was bound to show affirmatively the absence of negligence on his part. It can hardly be said that this distinction is adopted by the common law; although it has been said that the occurrence of such loss was *primâ facie* evidence of negligence; but it may well be doubted whether the common law raises such a presumption. (x) Certainly in most cases, if not in all, the question of ordinary negligence is one of fact, to be determined by the jury on the whole evidence, and not one of law. (y) And if the loss

the court, depends upon the fact that the goods came into his possession in his character of innkeeper, as belonging to a guest. *Smith v. Dearlove*, 6 C. B. 132.

(v) *Miles v. Cattle*, 6 Bing. 743.

(w) *Brind v. Dale*, 8 C. & P. 207.

(x) See Story on Bailm. § 333-339.

(y) *Doorman v. Jenkins*, 2 Ad. & El. 256.

may as well be attributed to the negligence of the owner as of the carrier, the carrier is not liable. We take the distinction between the common carrier and the private carrier for hire to be this. If goods given to either are neither delivered * nor accounted for, the carrier, whether common or private, is liable. But if it be shown that the goods were lost, then the common carrier is still liable, unless he brings the case within the exceptions of the act of God, or of the public enemy; but the private carrier is not liable, unless the owner shows that the loss arose from the carrier's negligence. (z) It is sometimes said that the liability of the common carrier is independent of contract and imposed by custom and public policy. We should prefer saying that it must arise from a contract and be founded upon it, but is then qualified and regulated by the customary law in a manner different from the liability assumed by a private carrier.

A private carrier for hire may undoubtedly enlarge his liability by special contract, even to the extent of warranty. Or he may lessen his liability by agreement. A special promise to carry "safely and securely," leaves him still liable only for negligence. (a)

The private carrier for hire would seem, on general principles, to have a lien on the goods for his hire; but this does not as yet appear to be distinctly adjudicated.

COMMON CARRIERS. The common carrier may be a carrier of goods, or of passengers, or of both. We shall first consider the common carrier of goods, and afterwards the common carrier of passengers.

The law in relation to the common carrier is very peculiar in many respects. He is held in the first place to very stringent responsibilities. He is not only responsible for any loss of or injury to the goods he carries, which is caused by his negligence, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than "the act of God," or the public enemy. (b)

(z) See *ante*, p. 606, n. (u.)

(a) *Ross v. Hill*, 2 C. B. 877.

(b) *Coggs v. Bernard*, 2 Ld. Raym. 909; *Proprietors of Trent Navigation*

v. Wood, 3 Esp. 127, 4 Doug. 290;

Forward v. Pittard, 1 T. R. 27; *Mer-*

shon v. Hobensack, 2 New Jersey, 372;

Chevallier v. Straham, 2 Texas, 115;

He is therefore held as an insurer of the goods, excepting only these two causes of loss. And this rule of law is at least as ancient as the reign of Elizabeth. (c) It is obviously founded on public policy. The goods are entirely within the power of the carrier; and it would be so easy for him to conceal his fraud or misconduct, and so difficult for the owner to prove it, that the law does not permit the inquiry to be made; but supplies the want of proof by a conclusive presumption. The "act of God" is considered by *some as equivalent to "inevitable accident," (d) but we do not so construe these phrases. There seems to be a real difference between them. The carrier is liable for loss by robbery, although the force was overwhelming, and wholly without notice. If it be said that he is liable for this loss, because it is not "inevitable," as a sufficient guard or other precautions might have prevented it, then we say that neither can injury from an inundation, a storm, or sudden illness, (all of which excuse him,) be regarded as "inevitable," because it is seldom that losses from these causes could not have been prevented by previous forethought and precaution. We take the true definition of the "act of God" to be, a cause which operates without any aid or interference from man. (e) For if the cause of loss was wholly human, or became destructive by human agency and coöperation, then the loss is to be ascribed to man and not to God, and to the carrier's negligence, because it would be dangerous to the community to permit him to make a defence which might so frequently be false and fraudulent. (f) Nor need this "act"

Friend v. Woods, 6 Grat. 189. And by reason of this liability they have an insurable interest in the goods. *Chase v. Washington M. Ins. Co.* 12 Barb. 595; *Steele v. Insurance Co.* 17 Penn. 290.

(c) *Woodlife v. Curties*, 1 Rol. Abr. 2, 124; 2 Co. Litt. 89 a; s. c., *nom.* *Woodlife's case*, Moore, 462.

(d) See *Fish v. Chapman*, 2 Geo. 349; *Neal v. Saunderson*, 2 S. & M. 572; *Walpole v. Bridges*, 5 Blackf. 222.

(e) "The act of God," says Lord *Mansfield*, "is natural necessity, as

wind and storms, which arise from natural causes, and is distinct from inevitable accident." *Proprietors of Trent Navigation v. Wood*, 4 Doug. 287, 290. See also the remarks of *Cowen, J.*, in *McArthur v. Sears*, 21 Wend. 190, 198.

(f) The case of *Forward v. Pittard*, 1 T. R. 27, is a very leading authority as to what constitutes an act of God. In that case the plaintiff's goods, while in the possession of the defendant as a common-carrier, were consumed by fire. It was found that the accident happened without any actual negligence in the defendant, but that the fire was

be positive; although only negative, it excuses the car-

not occasioned by lightning. Under these circumstances, the Court of King's Bench held the defendant liable; and Lord Mansfield said:—"A carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the king's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil. In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident." See also *McArthur v. Sears*, 21 Wend. 190; *Ewart v. Street*, 2 Bailey, 157; *Fish v. Chapman*, 2 Geo. 349; *Backhouse v. Sneed*, 1 Murphey, 173. Since the loss, to come within the exception of the "act of God," must happen without human agency, it is of course no excuse for the carrier that the loss was occasioned by the act of a third person. Thus the owners of a steamboat, being a common-carrier, are liable for a shipment on board of her, lost by means of a collision with another vessel at sea, and without fault imputable to either, there being no express stipulation of any kind, between the owner of the goods and the owners of the boat, that they should be exempted from the perils of the sea. *Plaisted v. B. & K. Steam Na-*

vigation Co. 27 Maine, 132. See also *Mershon v. Hobensack*, 2 New Jer. 372. For the same reason, the act of God, which will excuse a common-carrier for the loss of goods, must be the immediate and not the remote cause of the loss. This is well illustrated by the case of *Smith v. Shepherd*, Abbott on Shipping, 383, (5th Am. ed.) That was an action brought against the master of a vessel navigating the river Ouse and Humber from Selby to Hull, by a person whose goods had been wet and spoiled. At the trial, it appeared in evidence that at the entrance of the harbor at Hull there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river; that a few days after this flood a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel; and the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank remained in its former situation, but on the tide ebbing, her stern sunk into the water, and the goods were spoiled; upon which the defendant tendered evidence to show that there had been no actual negligence. Mr. Justice *Heath*, before whom the cause was tried, rejected the evidence; and he further ruled that the act of God, which could excuse the defendant, must be immediate; but this was too remote; and directed the jury to find a verdict for the plaintiff, and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction of the learned judge at the trial, and the plaintiff succeeded in the cause. There does not appear to have existed in this case any bill of lading, or other instrument of contract; and the question, therefore, depended upon general principles, and not upon the meaning of any particular word or exception. Mr. Justice *Story* in commenting upon this case, says:—"If the mast, which was the immediate

rier; a failure of wind is put upon the same footing as a storm. (g)

* But whether the loss be caused by excess or deficiency of wind, or any other act of God, if the negligence of the carrier mingles with it, he is responsible. (h) So he is for a loss by fire, whether on land or at sea, unless it be caused by lightning; (i) and this rule is applied to steamboats. (j) But the freezing of our navigable waters, whether natural or artificial, excuses the carrier, unless his negligence coöperates in causing the loss. (k)

cause of the loss, had not been in the way; but the bank had been suddenly removed by an earthquake, or the removal of the bank had been unknown, and the vessel had gone on the bank in the usual manner, the decision would have been otherwise." Story on Bailment, sect. 517. And this opinion seems to be supported by the case of *Smyrl v. Niolon*, 2 Bailey, 421, where it is held that a loss caused by a boat's running on an unknown 'snag' in the usual channel of the river is referable to the act of God; and the carrier will be excused. See also *Faulkner v. Wright, Rice*, 107; and *Williams v. Grant*, 1 Conn. 487. On the other hand, in *Friend v. Woods*, 6 Gratt. 189, where a common-carrier on the Kanawha river stranded his boat upon a bar recently formed in the ordinary channel of the river, of the existence of which he was previously ignorant, he was held liable for damage done to the freight on board his boat. And this last case has received the support of Mr. Wallace, one of the learned American editors of *Smith's Leading Cases*. See his note to *Coggs v. Bernard*, 1 *Smith's L. C.* 82.

(g) Thus where a vessel was beating up the Hudson river against a light and variable wind, and being near shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; it was held that the sudden failure of the wind was the act of God, and excused the master; there being no negligence on his part. And *Spencer, J.*, said:—"The case of *Amies v. Stevens*, 1 Strange, 128, shows that a sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven

against a pier and overset, by the violence of the shock, has been adjudged to be the act of God, or *vis divina*. The sudden gust in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case; and in the other the wind was stayed by Him." *Colt v. McMechen*, 6 Johns. 160. This case, however, has met with the disapprobation of Mr. Wallace. See note to *Coggs v. Bernard*, *ubi supra*.

(h) *Amies v. Stevens*, 1 Strange, 128; *Williams v. Branson*, 1 Murph. 417; *Williams v. Grant*, 1 Conn. 487; *Campbell v. Morse, Harper*, 468; *Clark v. Barnwell*, 12 How. 272.

(i) *Forward v. Pittard*, 1 T. R. 27; *Thorogood v. Marsh, Gow*, 105; *Hale v. N. J. Steam Navigation Co.* 15 Conn. 539, 545; *Parker v. Flagg*, 26 Maine, 181; *Parsons v. Monteath*, 13 Barb. 353; *Chevallier v. Straham*, 2 Texas, 115.

(j) *Gilmore v. Carman*, 1 S. & M. 279.

(k) *Parsons v. Hardy*, 14 Wend. 215. But the carrier is nevertheless bound to exercise ordinary forecast in anticipating the obstruction; must use the proper means to overcome it; and exercise due diligence to accomplish the transportation he has undertaken, as soon as the obstruction ceases to operate, and in the mean time must not be guilty of negligence in the care of the property. *Bowman v. Teall*, 23 Wend. 306. See also *Lowe v. Moss*, 12 Ill. 477. And where damage was done to a cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by

The carrier is not liable for any loss from natural decay of perishable goods; such as fruit or the like; or the fermentation of liquors, or their evaporation or leakage. (l) So far * as losses of this kind are caused by the operation of natural laws, they come within the exception of the "act of God." But the carrier is nevertheless not excused if the loss was caused also by his default, as by bad stowage, or other negligence. And if he is informed that the goods are perishable, or should know it from the nature of the goods, he is bound to use all reasonable means and precautions to prevent the loss. (m) So if a particular notice is given him; as by marking the box, "Glass, this side up," or the like, he is bound to take notice and follow these directions. (n)

Losses by the public enemy include those only which are sustained from persons with whom the State or nation is at

frost; it was *held* that this was not an act of God, but negligence in the captain, in filling the boiler before the time for heating it, although it was the practice to fill over night when the vessel started in the morning. And *Best*, C. J., said: "No one can doubt that this loss was occasioned by negligence. It is well known that frost will rend iron; and if so, the master of a vessel cannot be justified in keeping water within his boiler in the middle of winter, when frost may be expected. The jury found that this was negligence, and I agree in their verdict." *Siordet v. Hall*, 4 Bing. 607.

(l) Thus, if an action be brought against a carrier for negligently driving his cart, so that a pipe of wine was burst and lost, it will be good evidence for the defendant that the wine was upon the ferment, and when the pipe was burst he was driving gently. Per Lord *Holt*, in *Farrar v. Adams*, Bull. N. P. 69. See also *Leech v. Baldwin*, 5 Watts. 446; *Warden v. Greer*, 6 Watts. 424; *Clark v. Barnwell*, 12 How. 272. And where there is a custom to carry goods in open wagons, of which the sender had notice, the carrier is not liable for injuries caused by rains during the transportation. *Chevaillier v. Patton*, 10 Texas, 344.

(m) *Ibid*.

(n) Thus, where a box containing a glass bottle filled with oil of cloves, delivered to a common-carrier, was marked, "Glass—with care—this side up;"

it was *held* that this was a sufficient notice of the value and nature of the contents to charge him for the loss of the oil, occasioned by his disregarding such direction. And *Shaw*, C. J., said:—"It is not denied that the box was marked, 'Glass—with care—this side up,' which was quite sufficient notice to the defendant that the article was valuable, and liable to injury from rough handling and other causes, and that there was danger in carrying it in any other position than the one indicated by the inscription. As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carrying goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix his own rate for the carriage, or refuse altogether to take the goods with such directions, the court are all of opinion, that if a carrier accepts goods for carriage, thus marked, he is bound to carry the goods in the manner and position required by the notice. Here it is in evidence, and not denied, that the box was stowed in such a manner that the marked side was not kept up, and consequently the large bottle, which was broken by some cause in the passage, after it was stowed and before its arrival, bore its weight upon its side and not on its bottom." *Hastings v. Pepper*, 11 Pick. 41. See also *Sager v. Portsmouth, &c., Railroad Co.*, 31 Maine, 228.

war; and pirates on the high seas, who are "the enemies of all mankind;" (o) but not thieves; nor robbers; nor mobs; nor rioters, insurgents, or rebels. (p) But this principle may be affected by the rule that robbery at sea is piracy.

*SECTION VI.

WHO IS A COMMON-CARRIER.

To determine who is a common-carrier, we adopt the definition of Mr. Chief Justice *Parker* of Massachusetts. "He is one, who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." (q) And we regard this as a true definition, although in some of the States it has been held that a wagoner who carried goods on a special request, although such carrying was not his general business, but only occasional and incidental, was still a common-carrier. (r) It may sometimes be difficult to

(o) Story on Bailm. §§ 25, 526; Ang. Com. Car. § 200. We have ventured to include pirates within the exception of "public enemies," on the authority of these eminent text-writers. The cases, however, which they cite, arose upon bills of lading, which contained the exception of the "perils of the sea;" and the only question made in those cases was whether a loss by pirates came within the latter exception; and the testimony of merchants was taken as to the mercantile usage in that respect. See *Pickering v. Barkley*, 2 Rol. Abr. 248, Styles, 132; *Barton v. Wolliford*, Comb. 56.

(p) *Morse v. Slue*, 1 Vent. 190, 238.

(q) *Dwight v. Brewster*, 1 Pick. 50, 53. A similar definition is given in *Robertson v. Kennedy*, 2 Dana, 430; *Elkins v. Boston & Maine R. R.*, 3 Foster, 275; *Mershon v. Hobensack*, 2 New Jersey, 373. So in *Gisbourn v. Hurst*, 1 Salk. 249, it was resolved that "any man undertaking for hire to carry the goods of all persons indifferently is a common-carrier."

(r) *Gordon v. Hutchinson*, 1 W. & S. 285. In this case the defendant, being a

farmer, applied at the store of the plaintiff for the hauling of goods from Lewistown to Bellefonte, upon his return from the former place, where he was going with a load of iron. He received an order and loaded the goods. On the way, the head came out of a hog-head of molasses, and it was wholly lost; and this action was brought to recover the price of it. The defendant contended that he was not subject to the responsibilities of a common-carrier, but only answerable for negligence, inasmuch as he was only employed occasionally to carry for hire. But the learned judge before whom the cause was tried instructed the jury that he was liable as a common-carrier. And the Supreme Court held the instruction to be correct. *Gibson, C. J.*, said:—"The best definition of a common-carrier, in its application to the business of this country, is that which Mr. Jeremy (Law of Carriers, 4) has taken from *Gisbourn v. Hurst*, 1 Salk. 249, [see preceding note,] which was the case of one who was at first not thought to be a common-carrier, only because he had, for some small time before, brought cheese

draw the line ; and more difficult in this country than elsewhere, where men so often engage in a variety of employments ; but that the rule of law is as we have stated we cannot doubt.

to London, and taken such goods as he could get to carry back into the country, at a reasonable price ; but the goods having been distrained for the rent of a barn, into which he had put his wagon for safe keeping, it was finally resolved that any man undertaking to carry the goods of *all persons indifferently*, is as to exemption from distress a common-carrier. Mr. Justice Story has cited this case (Commentaries on Bailment, 322) to prove that a common-carrier is one who holds himself out as ready to engage in the transportation of goods for hire *as a business*, and not as a casual occupation *pro hac vice*. My conclusion from it is different. I take it a wagoner who carries goods for hire is a common-carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true, the court went no further than to say the wagoner was a common-carrier, as to the privilege of exemption from distress ; but his contract was held not to be a private undertaking, as the court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations ; and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common-carrier ; indeed, they are correlative, and there is no reason why he should enjoy the one without being burdened with the other. Chancellor Kent (2 Comm. 597,) states the law, on the authority of *Robinson v. Dunmore*, 2 B. & P. 416, to be that a carrier for hire in a *particular case*, not exercising the business of a *common-carrier*, is answerable only for ordinary neglect, unless he assume the risk of a common-carrier by express contract ; and Mr. Justice Story, (Com. on Bailment, 298,) as well as the learned annotator on Sir William Jones's Essay, (Law of Bailm. 103 d, note 3,) does the same on the authority of the same case. There, however, the defendant was held liable, on a special contract of warranty, that the goods should go safe ; and it was therefore not material

whether he was a *general carrier* or not. The judges indeed said that he was not a common-carrier, but one who had put himself in the case of a common-carrier by his agreement ; yet even a common-carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself answerable by a special agreement as well as on the custom. The question of carrier or not therefore did not necessarily enter into the inquiry, and we cannot suppose the judges gave it their principal attention. But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution, and no little qualification, to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price ; but it will not be thought that he is bound to do so here. Nothing was more common formerly than for wagoners to lie by in Philadelphia for a rise of wages. In England the obligation to carry at request upon the carrier's particular route is the criterion of the profession, but it is certainly not so with us. In Pennsylvania we had no carriers exclusively between particular places, before the establishment of our public lines of transportation ; and, according to the English principle, we could have had no common-carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the Pennsylvania wagoner was not always such even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns ; and many of them passed by their homes with loads

We regard truckmen, porters, and the like, who undertake

to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common-carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance or in the equipment of their teams from carriers by profession. I can readily understand why a carpenter encouraged by an employer to undertake the job of a cabinet maker, shall not be bound to bring the skill of a workman to the execution of it; or why a farmer taking his horses from the plough, to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than good faith; but I am unable to understand why a wagoner, soliciting the employment of a common-carrier, shall be prevented by the nature of any other employment he may sometimes follow from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and, in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility. Now, what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and, consequently, on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him—there was nothing special in the case—on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility.” It will be seen that the learned Chief Justice places considerable reliance upon the fact that the defendant applied to the plaintiff to get the goods to carry; and it is by no means certain that the decision would have been the same, if the application had come from the plaintiff. But we are not aware of any other case in which such a distinction is taken. The decision receives support, however, independently of this distinction, from the case of *McClure v. Richardson, Rice,*

215. In that case the defendant was the owner of a boat, in which he was accustomed to carry his *own* cotton to Charleston; and occasionally, when he had not a load of his own, to take for his neighbors, they paying freight for the same. One Howzer was the master, or *patroon* of the boat, and the *general* habit was for those who wished to send their cotton by the defendant's boat to apply to the defendant himself. On this occasion the patroon had been told to take Col. Goodwin's and Mr. Dallas's cotton, which he had done, when the plaintiff applied to Howzer, in the absence of the defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant himself, to which Howzer replied that he thought not, and received the cotton; it was *held*, that under the circumstances, the defendant was bound by the act of Howzer, as being within the general scope of the authority conferred upon him, by placing him in the situation of master of the boat, and that the defendant was consequently chargeable as a common-carrier for any loss of, or damage to, the plaintiff's cotton.—So too it has been laid down in general terms, in several cases, that all persons carrying goods for hire come under the denomination of common-carriers. See *Moses v. Norris*, 4 New Hamp. 304; *Turney v. Wilson*, 7 Yerg. 340; *Craig v. Childress, Peck*, 270; *McClures v. Hammond*, 1 Bay, 99. But it would seem to be an insuperable objection to all these cases that they exclude from the common-carrier one of his most important characteristics, namely, his *duty* to carry for all who may wish to employ him; for it is conceded in several of them that the individual whom they hold liable as a common-carrier was under no obligation to undertake the carrying in question, unless he had chosen so to do. The case of *Chevallier v. Straham*, 2 Texas, 115, may be thought to favor views similar to those declared in the cases already cited, but we think it does not. It appeared in that case that the defendant's principal business was farming, but that at a certain period of the year, known as the hauling season, he engaged in the forwarding business, and ran his wagon whenever he met with an opportunity. Under these circum-

generally to carry goods from one part of a city to another,

stances, he was held liable as a common-carrier. And the court said :—" From a comparison of the various authorities, to which we have referred for the distinguishing characteristics of both common and private carriers, it may be laid down as a rule, that all persons who transport goods from place to place, for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are common-carriers, and incur all their responsibilities. There are no grounds in reason why the occasional carrier, who periodically in every recurring year, abandons his other pursuits, and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation. For the time being he shares all the advantages arising from the business; and as the extraordinary responsibilities of a common-carrier are imposed by the policy and not the justice of the law, this policy should be uniform in its operation—imparting equal benefits, and inflicting the like burdens upon all who assume the capacity of public carriers, whether temporarily or permanently, periodically or continuously." It will be seen, therefore, that the only question with the court in this case was, whether it was necessary to constitute one a common-carrier that he should hold himself out as such continuously, or whether it was sufficient if he held himself out as such during a certain period of the year. And there would certainly seem to be no reason why one who holds himself out to the public as a common-carrier, for a certain season in the year, should not be liable as such. We think it is obvious, from the facts and circumstances of this case, that the defendant had held himself out to the public in such a manner that he would have incurred a liability if he had refused to carry for any one who wished to employ him during the season in question; and the court held him to be a common-carrier on this ground, and carefully distinguished him from one who undertakes to carry for hire in a particular instance and under a special contract. On the whole, it seems to be clear that no one can be considered

as a common-carrier, unless he has in some way held himself out to the public as a carrier, in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him. That such is the true test, see ——— *v. Jackson*, 1 Hayw. 14; *Fish v. Chapman*, 2 Geo. 349; *Samms v. Stewart*, 20 Ohio, 69. In *Fish v. Chapman*, Mr. Justice *Nisbet* declares that *Gordon v. Hutchinson* is opposed to the principles of the common law, and its rule wholly inexpedient. The case of *Satterlee v. Groat*, 1 Wend. 272, is also a very important one upon this point. It appeared that the defendant had been a common-carrier between Schenectady and Albany, previous to 1819. He then sold out all his teams but one, which he kept for agricultural purposes on his farm. One witness, however, testified that the defendant employed his team in the carrying and forwarding business, as occasions offered, until 1822 or 1823. But subsequent to that period, there was no evidence of his carrying or forwarding a single load, until April, 1824, when one John Dows applied to him to bring some loads for him from Albany to Schenectady, to which the defendant reluctantly consented, and despatched one Asia with his team for the purpose, with special instructions to bring nothing for any other person; and if Dows's goods were not ready, to come back empty. He brought two loads, and returned for a third, under the same instructions, repeated again and again; but Dows's third load not being ready, instead of returning empty as he was directed to do, he applied to the plaintiffs for a load, which they furnished him, to be carried to Frankfort, in Herkimer county. He arrived at Schenectady late at night. The next morning it was discovered that one of the boxes had been broken open, and a part of the goods stolen. The defendant disavowed all responsibility for the goods, before it was discovered that any of them had been taken, and declared that Asia had violated his express instructions in bringing them. Upon these facts the court held that the defendant was not liable. *Sutherland, J.*, said :—" The defendant stood upon the same footing as though he had never been engaged in the forwarding

as common-carriers; although this seems to be doubted. (s) That wagoners and teamsters who carry goods from one city to another are so, is certain.

business. He had abandoned it entirely certainly *one year*, and, according to the weight of evidence, four years previous to this transaction. He makes a special contract with Dows to bring goods for him from Albany, and gives his teamster express instructions to bring goods for no one else. He was acting under a special contract, and not in the capacity of a common-carrier. Is he then responsible for the act of his servant, done in violation of his instructions, and not in the ordinary course of the business in which he was employed? If a farmer send his servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and absconds with it, is the master responsible? Most clearly not. It was an act beyond the scope of the general authority of the servant; *quoad hoc*, therefore he acted for himself, and on his own responsibility, and not for his employer."

(s) In *Brind v. Dale*, 8 C. & P. 207, Lord Abinger expressed the opinion at Nisi Prius, that a town carman, whose carts ply for hire near the wharves, and who lets them by the hour, day, or job, is not a common-carrier. The correctness of this opinion is, however, severely questioned by Mr. Justice Story. "What substantial distinction is there," says he, "in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another, or from one place to another within the same town? Is there any substantial difference, whether the parties have fixed *termini* of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town, or in different towns?" See Story on Bailm. § 496, n. 1. So too the law was expressly adjudged, agreeably to what we have stated in the text, in *Robertson v. Kennedy*, 2 Dana, 430. That was an action against the defendant for the loss of a hogshead of sugar, which he, as a common-carrier, had undertaken, for a reasonable compensation, to carry from the bank of the river in Brandenburg

to the plaintiff's store in the same town. At the trial, the plaintiff introduced evidence tending to show that the defendant had been in the habit of hauling for hire, in the town of Brandenburg, for every one who applied to him, with an ox team, driven by his slave; that he had undertaken to haul for the plaintiff the hogshead in question, and that after the defendant's slave had placed the hogshead on a slide, for the purpose of hauling it to the defendant's store, the slide and hogshead slipped into the river, whereby the sugar was spoiled. Under these circumstances, the court held that the defendant was liable as a common-carrier. And *Nicholas, J.*, said:—"Every one who pursues the business of transporting goods for hire, for the public generally, is a common-carrier. According to the most approved definition, a common-carrier is one who undertakes for hire or reward to transport the goods of all such as choose to employ him from place to place. Draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is immaterial." And in *Ingate v. Christie*, 3 Carr. & Kir. 61, where the defendant who was a lighterman carrying goods from wharves to ships for anybody who employed him, was sued for 100 cases of figs lost by reason of the lighter containing them being run down by a steamer, and Mr. Justice Story's opinion as stated above was cited for the plaintiffs, *Alderson, B.*, said, "Mr. Justice Story is a great authority, and if we would but adhere to principle the law would be what it ought to be, a science. There may be cases on all sides, but I will adhere to principle if I can. If a person holds himself out to carry goods for every one as a business, and he thus carries from the wharves to the ships in harbor, he is a common-carrier, and if the defendant is a common-carrier he is liable here. There must be a verdict for the plaintiff." The same rule was applied by Lord Campbell to a person who collected goods in town to go by

Proprietors of stage coaches are not common-carriers of goods necessarily; but are so if they carry goods other than those of their passengers, usually, and hold themselves out as carrying for all who choose to employ them. (*t*)

* In the reign of James I. the responsibilities of a common-carrier of goods by land were held to be applicable to a bargeman; (*u*) and it has been declared that there is no difference between the carrier by land and the carrier by water. (*v*) Perhaps this assertion is too broad; but the weight of authority in this country seems to have determined that a common-carrier of goods by water is responsible for all losses

railway, but he himself carried them only to the railway station. *Hellaby v. Weaver*, 17 Law Times Rep., July 8, 1851, sittings in London after Trinity term.

(*t*) "If a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common-carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's." Per *Jones, J.*, in *Lovett v. Hobbs*, 2 Show. 127. See also, to the same point, *Dwight v. Brewster*, 1 Pick. 50; *Beckman v. Shouse*, 5 Rawle, 179; *Clark v. Faxton*, 21 Wend. 153; *Jones v. Voorhees*, 10 Ohio, 145; *Merwin v. Butler*, 17 Conn. 138. But in *Shelden v. Robinson*, 7 New Hamp. 157, it was held that the driver of a stage coach, in the general employ of the proprietors of the coach, and in the habit of transporting packages of money for a small compensation, which was uniform whatever might be the amount of the package, was a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common-carrier; there being no evidence to show him a common-carrier, farther than the fact that he took such packages of money as were offered. *Parker, J.*, thus stated the grounds of the decision. "It has not been suggested that the proprietors are liable in this case; and the evidence does not show the defendant a common-carrier. It does not show him to have exercised the business of carrying packages, as a public employment, because his public employment was that of a driver of a stage coach, in the employ of others.

It does not show that he ever undertook to carry goods or money for persons generally, although he may in fact have taken all that was offered, as a matter of convenience; or that he ever held himself out as ready to engage in the transportation of whatever was requested, notwithstanding it may have been unusual [?] for him and other drivers to carry it. This was not his general employment, and there is nothing to show that he would have been liable had he refused to take this money, especially as he was in the service of another, and as such servant might have had duties to perform inconsistent with the duty of a common-carrier. The amount to be paid for transportation is also to be considered. A common-carrier is an insurer, and entitled to be paid a premium for his insurance. There being no evidence that any compensation was agreed on between these parties, it is to be presumed that the usual compensation was to be paid. The plaintiff might have relied on the usage upon a claim of payment. And as the sum was small and uniform, whatever might be the amount of money, it would seem very clear that no one committing a package of money to the defendant under such circumstances, and without any special agreement, could have considered him an insurer of safety." See also *Bean v. Sturtevant*, 8 New Hamp. 146.

(*u*) *Rich v. Kneeland*, Cro. Jac. (11 Jac. 1) 330, Hob. 17.

(*v*) Per *Buller, J.*, in *Proprietors of Trent Navigation v. Wood*, 3 Esp. 127, 4 Doug. 287; and per *Story, J.*, in *King v. Shepherd*, 3 Story, 360.

excepting those caused by the public enemy, or by those causes provided for by express contract. (*w*) Canal boatmen are such carriers, (*x*) and cannot sell property sent by them to market without express authority from the owner. (*y*) So are boatmen on our rivers. (*z*) Ferry-men are not common-carriers of goods necessarily; but generally become so by usage. (*a*) And this, although it be a private ferry, not established by the authority of the State. (*b*) And if it be a public ferry, and the tolls are regulated by law, and the ferryman is appointed by the State executive, and gives bonds *with sureties, this does not prevent the liabilities of a common-carrier from attaching to him. (*c*)

Steamboats are the most common kind of inland carriers by water at the present day; and they are undoubtedly common-carriers of goods, if they fall within the general definition. But they may be carriers of passengers only. And they may be carriers of only one particular kind of goods and merchandise. And where a limitation of their business of this kind is declared by them, and made known to a party dealing with them, their liability is limited accordingly. (*d*) And a steamboat which is usually a common-carrier, and is employed in towing a vessel, is not as to this a common-carrier; but is bound only to ordinary care and skill. (*e*) So,

(*w*) Thus, in *Elliott v. Russell*, 10 Johns. 1, it was held that masters and owners of vessels, who undertake to carry goods for hire, are liable as common-carriers, whether the transportation be from port to port within the state, or beyond sea, at home or abroad; except so far as they are exempted by the exceptions in the contract of charter-party, or bill of lading, or by statute. See also *Kemp v. Coughtry*, 11 Johns. 107; *Crosby v. Fitch*, 12 Conn. 410; *Parker v. Flagg*, 26 Maine, 181; *Hastings v. Pepper*, 11 Pick. 41; *Allen v. Sewall*, 2 Wend. 327, 6 Wend. 335; *McArthur v. Sears*, 21 Wend. 190, overruling whatever is *contra* in *Aymar v. Astor*, 6 Cow. 266.

(*x*) *Harrington v. Lyles*, 2 N. & McC. 88; *De Mott v. Laraway*, 14 Wend. 225; *Parsons v. Hardy*, 14 Wend. 215; *Spencer v. Daggett*, 2 Verm. 92.

(*y*) *Arnold v. Halenbake*, 5 Wend. 33.

(*z*) *Gordon v. Buchanan*, 5 Yerg. 71; *Turney v. Wilson*, 7 Yerg. 341.

(*a*) *Smith v. Seward*, 3 Barr, 342; *Pomeroy v. Donaldson*, 5 Missouri, 36; *Cohen v. Hume*, 1 McCord, 439; *Fisher v. Clisbee*, 12 Ill. 344. See as to the duties of ferry-men in the preparation and management of their boats, *Willoughby v. Horridge*, 16 E. L. & E. 437; *White v. Winnisimmet Co.*, 7 Oush. 156.

(*b*) *Littlejohn v. Jones*, 2 McMullan, 365.

(*c*) *Babcock v. Herbert*, 3 Ala. 392.

(*d*) *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 16.

(*e*) This rule seems to have been declared for the first time by the Supreme Court of New York, in the case of *Caton v. Rumney*, 13 Wend. 387. The same question arose again in the same court, in the case of *Alexander v. Greene*, 3 Hill, 9, and was decided the

where such a steamboat was hired to take a vessel through the ice, it was, in this employment, no common-carrier. (*f*)

In the reign of Charles II. it was decided that a ship sailing on the ocean may be a common-carrier; (*g*) and this decision has since been repeatedly confirmed; (*h*) and it was also held that an action lay equally against the master and

same way. And *Bronson, J.*, thus stated the grounds of the decision. "I think the defendants are not common-carriers. They do not receive the property into their custody, nor do they exercise any control over it, other than such as results from the towing of the boats in which it is laden. They neither employ the master and hands of the boats towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The goods or other property remain in the care and charge of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the defendants, it can hardly be pretended that they would be answerable, and yet carriers must answer for such a loss." This case afterwards, however, came before the Court of Errors, and was overruled. 7 Hill, 533. But upon what principle of law cannot be learned from the opinions delivered. And in the more recent case of *Wells v. Steam Navigation Co.* 2 Comst. 207, in the Court of Appeals of the same State, this decision of the Court of Errors is declared to be of no authority, and the former decisions of the Supreme Court are reestablished. The same rule is declared in the case of *Leonard v. Hendrickson*, 18 Penn. St. Rep. 40. And *Chambers, J.*, says:—"The law of liability of common carriers is one of public policy, and is to be maintained. Does this policy extend to the towing of boats and rafts on navigable or other waters? This exercise of power is peculiar and limited. It is generally for short distances, under the eye and observation of the owner, who may, and often does accompany, by himself or his agents, the property that is towed for him. If there is peril from the sudden rise of the water, or other unforeseen danger, he may terminate the conveyance at any point of safety in his opinion. The cargo on a canal boat towed is property in the

care of the conductors of such boat as common-carriers, of which they have the exclusive possession, and for which they are responsible, knowing its value and quality. The captain or owner of a boat undertaking to tow a loaded canal boat, we presume, neither inspects the cargo or overhauls it. His contract has reference to size, tonnage, and obstruction, to which the power of his boat is to be applied; and the connection of his boat by the chain or rope with the vessel and rafts to be conveyed to a fixed point, is the limited control he has over the property thus transported. It was an apt illustration of the learned judge who delivered the opinion of the court below, in saying: 'Wherein does this case differ in principle from that of a railroad company, or the State furnishing locomotive engines for drawing the cars of individuals over the road? The application of steam power to towing boats, &c., is only distinguishable from horse power where it can be used in the extent of the power. Would it be pretended that a man who furnished horses and a driver, to tow a boat or raft, was an insurer as a common-carrier for the boat to be towed and its contents?' It has been held, however, in Louisiana, that the owners of steam tow-boats are liable as common-carriers. See *Smith v. Pierce*, 1 Louis. 349; *Adams v. New Orleans Steam Tow-Boat Co.* 11 Louis. 46. And Mr. Justice *Kane*, of the United States District Court for the Eastern District of Pennsylvania, in the case of *Vanderslice v. Steam Tow-Boat Superior*, 13 Law Reporter, 399, urged very strongly the reasons for holding them so liable, but he did not decide the point.

(*f*) *Steam Navigation Co. v. Dandridge*, 8 Gill & Johns. 248, 320.

(*g*) *Morse v. Slue*, 1 Vent. 190, 238.

(*h*) *Boucher v. Lawson*, Cas. Temp. Hardw. 84, 194; *Boson v. Sandford*, 1 Show. 29, 101; *Goff v. Clinkard*, cited in *Dale v. Hall*, 1 Wils. 282. See also cases cited *ante*, p. 644, n. (*w*)

owners of the vessel. (i) But it is not every ship that carries goods for another than her owner that becomes a common-carrier. If the owner, or hirer, loads her with his own cargo, and finding some room to spare, receives the goods of another person to fill this room, the ship is no common-carrier; nor is she, unless she is what is sometimes called a general ship; that is, offered to the public, as ready to take any goods of any owner to the port to which she is bound. Common-carriers by land have usually, if not always, a certain distinct route, not for each particular journey merely, but for all their journeys. That is, they are established and known to the public as carrying upon such a line of transit, and upon no other. This is true also of ships belonging to an established packet line. Such ships would stand upon the same footing as ordinary carriers by land, and there seems to be no reason why the same rules of law should not apply to them. But there is a considerable difference between such a ship and a general ship which is put up for a voyage which she never went before, and is never to go again. If the question were wholly unsettled, it might perhaps be doubted *whether such vessel becomes a common-carrier; for if she does, it can hardly be denied that she is bound to take goods of any one who offers them. But the distinction between a regular packet ship and a general freighting ship for a particular voyage does not seem to have been taken by the courts. Still, it is usual in all ships, for the master to give a bill of lading for goods received, by which he engages to deliver them to the order of the party from whom he receives them, certain risks excepted. This ancient document, in almost universal use among mercantile nations, undoubtedly determines the rights and duties of the parties, so far as it affects them. Thus it usually excepts "the perils of the sea;" and then the ship is not responsible for a loss by one of these perils, although it could not be referred to the "act of God." (j) And if other exceptions were in-

(i) See also, to this point, *Boson v. Sandford*, 1 Show. 29, 101.

(j) As to what losses come within the exception of "perils of the sea," see the following cases. *Williams v. Grant*, 1 Conn. 487; *McArthur v. Sears*, 21 Wend. 190; *Plaisted v. B. & K. Steam Navigation Co.* 27 Maine, 132; *Gor-*

troduced, they would limit the liability accordingly. So also if a ship is hired by a charter party, to carry goods for the hirers on a certain voyage, or a certain time, and upon certain terms, this charter determines the relation of the parties, and their rights and responsibilities, and not the law of common-carriers.

Railroad companies have carried goods but for a short period; but wherever they are established they supersede almost all other modes of conveyance; they exist expressly to carry goods and passengers; their termini and routes are definitely fixed; they advertise for freight, offering to the public the terms on which they will receive. It seems strange that a doubt whether they were common-carriers could have existed; that they are, is, however, abundantly settled by authority. (*k*) But there are some peculiarities in the law which regulates their liabilities, which we shall speak of hereafter.

*SECTION VII.

OBLIGATIONS OF A COMMON-CARRIER.

A private carrier may or may not carry for another, as he prefers. But a common-carrier is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment; and is liable to an action in case of refusal. (*l*) But he is entitled to his

don v. Buchanan, 5 Yerg. 71; Turney v. Wilson, 7 Yerg. 340; Buller v. Fisher, 3 Esp. 67; The Schooner Reeside, 2 Sumn. 567; King v. Shepherd, 3 Story, 349; Whitesides v. Thurlkill, 12 S. & M. 599; The Rebecca, Ware, 188, 210; Van Syckel v. The Ewing, Crabbe, 405; The Newark, 1 Blatch. 203; Clark v. Barnwell, 12 How. 272; Rich v. Lambert, 12 How. 347. As to rats, Laveroni v. Drury, 16 E. L. & E. 510. As to the exception of loss by "robbers," or "dangers of the roads," see De Rothschild v. R. M. Steam Packet Co. 14 E. L. & E. 327.

(*k*) See Thomas v. B. & P. Railroad

Co. 10 Met. 472; Pickford v. Grand Junction Railway Co. 8 M. & W. 372; Norway Plains Co. v. Boston & Maine Railroad, 1 Gray, 263. They are not, however, common-carriers of goods by their passenger trains, and evidence of one or two instances in which they have so carried will not prove that they intended to hold themselves out as such carriers, but the presumption will be that the goods were carried in this manner for temporary convenience only. Elkins v. Boston & Maine Railroad, 3 Fost. 275.

(*l*) Lane v. Cotton, 12 Mod. 472, 484; Jackson v. Rogers, 2 Show. 327; John-

pay; he may demand it, and if it be refused, he may refuse to carry the goods. The owner of the goods may tender him the freight-money; or, if the money is not demanded by the carrier, he may aver and prove that he was ready and willing to pay the freight-money; and this will be equivalent to a tender. (m) Payment of the fare has been inferred without * proof, from the mere usage to pay; (n) but we doubt whether this could safely be adopted as a general rule.

It is a good excuse for the carrier's refusal that his carriage was full, (o) or that the goods would endanger him, or incur

son v. Midland Railway Co. 4 Exch. 367; Pickford v. The Grand Junction Railway Co. 8 M. & W. 372.

(m) Pickford v. The Grand Junction Railway Co. 8 M. & W. 372. So if the carrier demands payment before he receives the goods, and demands a larger sum than he is entitled to receive, the owner of the goods may pay him such sum as he demands, under protest, and recover back the excess in an action for money had and received. And to entitle him to recover in this action, it is not necessary that he should make a tender to the carrier of such sum as he is entitled to receive. Parker v. The Great Western Railway Co. 7 M. & Gr. 253, 8 E. L. & E. 426; Edwards v. The Great Western Railway Co. 8 E. L. & E. 447; Crouch v. The London & C. Railway Co. 2 Car. & K. 789; — v. Pigott, cited in Cartwright v. Rowley, 2 Esp. 723; Parker v. The Bristol & C. Railway Co. 7 E. L. & E. 528. The same rule holds where the carrier, not having received his pay in advance, nor made any special agreement, refuses to redeliver the goods at the end of his transit until he is paid a larger sum for the carriage than he is entitled to receive. Thus in Ashmole v. Wainwright, 2 Q. B. 837, the defendants, common-carriers, refused to redeliver the plaintiff's goods, which they had carried for him, except on payment of £5 5s. charges. He insisted that he was not liable to pay any thing; but, ultimately, the defendants having said that they would take nothing less than the whole sum, he paid the whole to regain his goods, protesting that he was not liable to pay any thing, and that, if he was liable, the charge was exorbitant. He had not tendered or named any smaller sum.

Afterwards, without having demanded the return of any surplus, he brought assumpsit for money had and received, claiming by his particular the whole sum, as having been paid in order to obtain possession of his goods, under protest that he was not liable to pay the same, or any part thereof, or, if he was liable to pay some part, that the sum was exorbitant. The jury having found that the defendant was entitled to charge £1 10s. 6d., the court held that the plaintiff was entitled to recover the difference in this form of action; and that it was not necessary to his right of recovery that he should have tendered any specific sum. But, *semble*, per *Paterson, J.*, that if a party, simply denying that any thing is due, tenders a sum which is accepted, but which exceeds the sum legally demandable, he cannot recover back the excess. This case was doubted by *Pollock, C. B.*, in the late case of *Parker v. The Bristol & C. Railway Co.* 7 E. L. & E. 528, on the ground that the action for money had and received must be brought for a definite, clear, and certain sum, and not for some unknown sum, which is to depend upon the verdict of the jury, who are to decide whether the defendant has received the money or not. He stated, however, that the doubt belonged exclusively to his own mind, and not to that of the rest of the court, who were satisfied with the decision, and altogether agreed with it, not merely as a binding authority, but as agreeable to their own opinion and judgment.

(n) McGill v. Rowand, 3 Barr. 451.

(o) Lovett v. Hobbs, 2 Show. 127. But not, it seems, if he has issued a ticket for the journey and has put no condition to his liability. Hawcroft v.

themselves extraordinary danger, (*p*) or are not such as he carries in the known and usual course of his business; (*q*) or that he cannot at the time and in the way proposed receive them without unreasonable loss and inconvenience. And he is not obliged to receive them until he is ready to set forth on his route. (*r*)

A common-carrier may make what contract he will as to his compensation; but a tender of his *usual*, or of a reasonable compensation, obliges him to carry; (*s*) and when he carries without special agreement, this is all the compensation he can recover. In the absence of special agreement, he must treat all persons alike; and where required by statute to make reasonable and equal charges against all, he cannot by by-laws or rules discriminate as to amounts or modes of computation between persons according to their occupations, but must carry the same amount, the same distance, for the same price, for all persons. (*t*)

*SECTION VIII.

WHEN THE RESPONSIBILITY BEGINS.

As soon as the goods are delivered and received, they are at the risk of the carrier. This reception of them may be specific or general, and according to the usage of his business; and it may be actual, or constructive. (*u*) But the delivery to the carrier is not complete if the goods are still in charge of the owner or his representative; the delivery must place the goods in the custody of the carrier. (*v*) The

Great Northern Railway Co. 8 E. L. & E. 362.

(*p*) Edwards v. Sherratt, 1 East, 604; Pate v. Henry, 5 Stew. & Port. 101.

(*q*) Sewall v. Allen, 6 Wend. 335; Tunnell v. Pettijohn, 2 Harring. 48; Citizens Bank v. Nantucket Steamboat Co. 2 Story, 16; Johnson v. The Midland Railway Co. 4 Exch. 367.

(*r*) Lane v. Cotton, 1 Ld. Raym. 646, 652, 1 Com. 100, 105.

(*s*) Harris v. Packwood, 3 Taunt. 264.

(*t*) Pickford v. Grand Junction Railway Co. 10 M. & W. 399; Parker v. Great Western Railway Co. 7 M. & Gr. 253, 8 E. L. & E. 426; Edwards v. Great Western Railway Co. 8 E. L. & E. 447; Crouch v. The London & C. Railway Co. 2 Car. & K. 789.

(*u*) Merriam v. The Hartford & Railroad Co. 20 Conn. 354.

(*v*) Brind v. Dale, 8 C. & P. 207. It frequently becomes a difficult question of fact whether goods have been so delivered to a carrier as to be in

delivery to a ship is complete when the master or mate, or other agent of the owner, receives them, either at the ship or

his custody and under his control, or whether they still continue under the control of the owner or his servant. There are several cases in the books which have turned upon this question. Thus, in the case of the *East India Co. v. Pullen*, Strange, 690, an action was brought against the defendant as a common-carrier, on an undertaking to carry for hire on the River Thames, from the ship to the company's warehouses. It appeared in evidence that the defendant was a common lighter-man, and that it was the usage of the company, on the unshipping of their goods, to put an officer, who was called a guardian, into the lighter, who, as soon as the lading was taken in, put the company's locks on the hatches, and went with the goods to see them safely delivered at the warehouse. It appeared that such was the course in this case, and part of the goods were lost. Upon this evidence, *Raymond*, C. J., was of opinion that "this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself." The plaintiff was accordingly nonsuited. So in the late case of *Tower v. The Utica &c. Railroad Co.* 7 Hill, 47, where an action was brought to charge a railroad company, as common-carriers, for the loss of an overcoat belonging to a passenger, and it appeared that the coat was not delivered to the defendants, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and it was afterwards stolen; it was held that the defendants were not liable. And *Nelson*, C. J., said:—"The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. Being an article of wearing apparel of present use, and in the care and keeping of the traveller himself for that purpose, the defendants have a right to say that it shall be regarded in the same light as if it had been upon his person. No carrier, however discreet and vigilant, would think of turning his attention to

property of the passenger in the situation of the article in question, or imagine that any responsibility attached to him in respect to it." On the other hand, in *Robinson v. Dunmore*, 2 B. & P. 416, it appeared in evidence that the plaintiff, who was an upholsterer, having occasion to send some furniture into the country, agreed with the defendant to take the same; that the defendant brought his cart to the plaintiff's house, where the goods were loaded in the presence of the plaintiff himself, and with the assistance of two of the plaintiff's servants; that the plaintiff having observed that the tarpaulin which the defendant had brought for the purpose of covering the cart was too small, the defendant said, "I have plenty of sacks, and I will warrant the goods shall go safe;" that, on account of the defendant's being a stranger to the plaintiff, the latter sent one of his own porters with the cart, who would otherwise have gone by the stage; that this porter in the course of the journey paid a person for watching the goods one night; and that the goods in the course of the journey were damaged by rain. Upon these facts, the jury, under the direction of Lord *Eldon*, before whom the case was tried, found a verdict for the plaintiff. And a rule *nisi* having been obtained for setting this verdict aside and entering a nonsuit, *Chambre*, J., said:—"This is a very clear case. The defendant is not a common-carrier by trade, but has put himself into the situation of a common-carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case; the defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined that if a man travel in a stage coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. In this case the plaintiff, for greater caution, sends his servant with the goods, who

on the wharf, or in a warehouse, if such delivery and receipt be according to the usage. And the owners of the ship forthwith become insurers as to all but the cases excepted by law, or by the bill of lading. (*w*) Delivery may be made in a different way, or at a different time or place, from that which is usual, or notified to the public; such difference being requested, or suggested by the carrier, or his agent, or sanctioned by him by receiving the goods without objection, and entering them on the way-bill. (*x*) The responsibility * of the carrier is fixed by his acceptance of the goods without objection, whatever be the manner of the delivery. Nor is it necessary to complete the delivery that the goods should be entered on the way-bill or freight list, or any written memorandum made. (*y*)

The same person may be a common-carrier and also a warehouse-man, or an innkeeper, or a wharfinger, or a forwarding merchant. And goods may be delivered to him and lost under circumstances which would render him liable if he received them *as* a carrier, but not if he received them in

pays for watching them, because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property, since it is more for his interest that the property should not be lost than that he should have an action against the carrier. This case bears no resemblance to that cited from *Strange*, for there the decision proceeded on the usage of the East India Company, who never intrust the lighterman with their goods, but give the whole charge of the property to one of their own officers, who is called a guardian." The rule was accordingly discharged. See also *Richards v. The London &c. Railway*, 7 C. B. 839; *White v. Winnisimmet Co.* 7 Cush. 155.

(*w*) *Cobban v. Downe*, 5 Esp. 41. But a delivery to any one of the crew is not sufficient, they not being authorized agents for that purpose. *Leigh v. Smith*, 1 C. & P. 638. And, generally, a delivery to a servant of the carrier must be to one authorized to receive the goods. Therefore, where the plaintiff delivered a package to the driver of a coach, who had no authority to receive and enter it on the way-bill, but

consented to carry it on to the next agent and have it entered; it was *held* to be no delivery to the carrier. *Blanchard v. Isaacs*, 3 Barb. 388. The master of a vessel cannot bind the owner by a bill of lading for goods not actually put on board. *Grant v. Norway*, 2 E. L. & E. 337; *Hubbersty v. Ward*, 18 E. L. & E. 551.

(*x*) Therefore, where a package was delivered to the agent of a stage-coach company, at the post-office, where the stage was standing, and not at the office of the company, to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way-bill, he having previously directed the person who had the care of the package to bring it to the post-office; and the package was lost before leaving Hartford; it was *held* that the owners of the coach were liable to the owner of the package for its value, the delivery at the post-office being with the assent of their agent. *Phillips v. Earle*, 8 Pick. 182. See also *Pickford v. The Grand Junction Railway Co.* 12 M. & W. 766.

(*y*) *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 16, 35.

another capacity, the loss not having occurred through his negligence. And it is sometimes quite difficult to determine in what capacity the goods were received. (z)

(z) See the case of *Roberts v. Turner*, 12 Johns. 232, cited and stated fully *ante*, p. 618, n. (q). The point considered in that case came under discussion again in the late case of *Teal v. Sears*, 9 Barb. 317. It was an action on the case against the defendants as common-carriers, to recover for the loss of a case of goods. The facts were as follows: On the 6th of October, 1846, the plaintiffs shipped, at Albany, three cases of goods for Buffalo, on a canal boat. A bill of lading was made out by the plaintiffs, and forwarded by the captain of the canal boat, with directions to deliver the goods in the bill as addressed, and collect the charges for transporting on the canal. The three cases were marked on the bill, "A. B. Case, Chicago, by vessel, care of Sears & Griffith, Buffalo." The cases were received by Sears & Griffith, (the defendants) at Buffalo, on the 14th of October, and they paid the canal charges, indorsing a receipt therefor, and a memorandum of the receipt of the goods, on the bill of lading. The defendants were at the time, engaged in the forwarding and commission business at B. That was their principal business, but they were interested to some extent in a transporting line on the canal, and also in at least one vessel carrying freight upon the lakes. On the 17th October, the defendants shipped the goods on board the schooner C., a transient vessel, which ran between Buffalo and Chicago, in which they had no interest. They took the captain's receipt, and made a bill of lading for the goods, agreeing with the captain as to the amount of freight he should receive. The vessel was a good one, and her captain in good credit. One of the cases of goods was lost before arriving at Chicago. Upon these facts the court held, 1. That the legal import of the memorandum was not that the goods should be stored at Buffalo, and that the defendants should act as agents of the plaintiffs in procuring a carrier of them from Buffalo to Chicago; but that they were consigned to the defendants at B., with a request or direction that they should be carried, by vessel, from B. to Chicago. 2. That the defend-

ants, receiving the goods with the accompanying memorandum, and transporting or causing the same to be transported, by vessel, to Chicago, were to be regarded as impliedly contracting to carry; and upon such a receipt the risk of a carrier, and not that of a *warehouse-man* or *forwarder*, attached. *Roberts v. Turner* having been cited for the defendants, *Wright, J.*, who delivered the opinion of the court, thus endeavored to distinguish the two cases:—"We are referred to *Roberts v. Turner*, 12 Johns. 232, as controlling this case. That case was decided in 1815. But without referring to the actual condition of the business of the country since that decision, the case is distinguishable from the present. In that the whole facts showed that Turner acted but as a forwarder of the goods. He kept a store at Utica, where produce was left by the public to be forwarded by boats or wagons to Albany. He had no interest in the boats or wagons. The plaintiff knew when his ashes were left to be sent to Albany that Turner's only business, in relation to the carriage of goods, consisted in forwarding them. This was also understood by the public; and that without any concern in the vessels by which the goods were forwarded, or any interest in the freight, they were stored with him merely for the purpose of forwarding by others; he taking upon himself the expenses of transportation, for which he received a compensation from the owners of the goods. But this was not the position of the defendants in the present suit. They were in a measure engaged in the carrying business and were interested to some extent in vessels on the canal and lakes. They kept a public office for the transaction of their business, at a place of transshipment, receiving and carrying all goods that might be directed to their care, in their own vessels when convenient, and in such other vessels as they could employ on terms most advantageous to themselves. They received the goods in question directed to them, which were destined west on the lakes. They employed a vessel to carry them forward, making out a new freight bill, and returning the old one,

The principle which governs these cases may be stated thus. If the transportation be the chief thing, and the deposit of the goods on a wharf or in a building be for a short time only, and merely incidental to the transportation, and the owner of the goods relinquishes them entirely when they are so deposited, then they are so delivered to the common-carrier in that capacity, and he is liable for them accordingly. (a) Thus, most carriers have a receiving office, or depot, or station. However such a place be called, goods once delivered and received there are as much at the risk of the carrier as if they were packed in the wagon or car, and in actual motion. (b) But if they are deposited even in such receiving office, with orders not to transport them, but to let them lie until further instructions shall be given by the * owner, the carrier has not received them *for carriage*; or, in other words, he has not received them as a carrier, but only as a depositary. (c) As soon as final instructions to transport the goods were received by the carrier, perhaps his liability in that character would begin. But not if the goods had been previously deposited there, for a distinct time, and an independent purpose. In such case the order to carry would have no farther operation than an order by an owner to carry goods in the owner's possession. It attaches no liability until the order is executed, or begins to be executed. So, if goods are deposited with one who is a carrier, but distinctly for the purpose of warehousing them, the depositary is answerable only for negligence; and if afterwards he is

and for themselves taking the captain's receipt for the goods. Persons ostensibly engaged as forwarders have, in this State, become numerous, and their business complicated and extensive. The rigid rules of the common law make the carrier assume the liability of an insurer of property, whilst the warehouse man and forwarder are but answerable as bailees, for ordinary neglect. The law distinctly defines the business of each, and their liabilities. Whilst the warehouse-man confines himself to the receipt and storage of goods, for a compensation, and a forwarder to the receipt of goods, and the forwarding of them by a carrier other

than himself, in good credit and in safe vessels, they only assume the liability of depositaries for hire. But if, calling themselves forwarders, they so act and conduct their business as to lead the public to regard them as carriers, and employ them as such, without intimation of their true character, the liabilities of a carrier attach to them."

(a) *Maving v. Todd*, 1 Stark. 72.

(b) *Camden & Amboy Railroad & Co. v. Belknap*, 21 Wend. 354; *Woods v. Devin*, 13 Ill. 746; *Moses v. Boston & Maine R. R.* 4 Foster, 71.

(c) *Platt v. Hibbard*, 7 Cow. 497; *Moses v. Boston & Maine R. R.* 4 Foster, 71.

ordered to carry, and undertakes to carry the same goods, his peculiar liability as carrier does not begin until he begins to carry, or moves the goods, or prepares them for carriage, taking them as it were anew into his possession for this specific purpose.

The delivery to a carrier must be known to the carrier, in order to create a responsibility on his part. (*d*) If goods are left in his depot or receiving office, with no notice to him, and no knowledge by him, he is not then, in general, bound to any care or charge of them. But usage, or terms made public by advertisement, might raise such an obligation. (*e*) As if he

(*d*) *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Campb. 414; *Packard v. Getman*, 6 Cow. 757.

(*e*) *Mechanics & Traders Bank v. Gordon*, 5 Louis. Ann. 604. The late case of *Merriam v. The Hartford &c. Railroad Co.* 20 Conn. 354, is very strong to this point. In that case, certain goods, designed to be transported by the defendants, as common-carriers, from New York to Meriden in Connecticut, were delivered in New York, in the usual manner, on the defendants' private dock, which was in their exclusive use for the purpose of receiving property to be transported by them. It was held that such delivery was a good delivery to the defendants to render them liable for the loss of the goods, although neither they nor their agent were otherwise notified of such delivery. And *Storrs, J.*, said:—"A contract with a common-carrier for the transportation of property, being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be either actual or constructive. The general rule is, that it must be delivered into the hands of the carrier himself, or of his servant, or some person authorized by him to receive it; and if it is merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or is placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there would be no bailment or delivery of the property, and he, consequently, could not be made responsible for its loss.

Addison on Cont. 809. But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If, therefore, they agree that the property may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case, the defendants had not agreed to dispense with express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case sufficient to show a public offer, by the defendants, to receive property for that purpose, in that mode; and that the delivery of it there accordingly, by the plaintiff, in pursuance of such offer, should be deemed a compliance with it on his part; and so to constitute an agreement between the parties, by the terms of which the property, if so deposited, should be considered as delivered to the defendants, without

had advertised that parcels properly directed might be put into his box, that adequate provisions had been made for their safety, and that he should hold himself responsible for them, he would in such case undoubtedly be held to this responsibility. And the knowledge of his authorized agent is his knowledge. (*f*) But not every one employed by him is his agent in such wise as to charge him with this responsibility. (*g*) Drivers of stage-coaches, or conductors of cars, may be in the habit of carrying goods generally, in parcels of some particular kind, on their own account, receiving themselves the pay, and not accounting for it to their employers. One who delivers goods to such a person for carriage, knowing that he carries them only in this way, and that no part of the compensation he receives goes to his employer, cannot hold that employer liable for loss of the goods. (*h*) But the employing carrier cannot defend himself by showing that his servant carried the goods on his separate account, and for his separate gain, provided the owner did not know the state of the case, but believed that the

any further notice. Such practice and usage was tantamount to an open declaration, a public advertisement, by the defendants, that such a delivery should, of itself, be deemed an acceptance of it by them, for the purpose of transportation; and to permit them to set up against those, who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud. The present case is precisely analogous to that of the deposit of a letter for transportation in the letter-box of a post-office, or foreign packet vessel, and to that of a deposit of articles for carriage in the public box provided for that purpose, in one of our express offices; where it would surely not be claimed that such a delivery would not be complete, without actual notice thereof to the head of these establishments or their agents."

(*f*) *Burrell v. North*, 2 Car. & K. 680; *Davey v. Mason*, 1 Car. & M. 45; *D'Anjou v. Deagle*, 3 H. & Johns. 206.

(*g*) But the agent must have an authority for this purpose, or be held out as having it. Therefore, where a com-

mon-carrier sent his wagon to Nashville with a load of cotton, and the driver was a young negro who had never been allowed to make contracts for hauling, and who had never before been intrusted with the wagon and team alone, and who was particularly instructed to bring home a load of salt, and not to receive goods of any kind for carriage, notwithstanding which he did receive goods for carriage, and the goods were damaged; it was held that the owner of the team was not liable. *Jenkins v. Pickett*, 9 Yerg. 480.

(*h*) Thus, where a ship is not put up to freight, but employed by the owner on his own account; and the master receives goods of another person on board as part of his privilege, taking to himself the freight and commissions, the owner of the ship is not liable in case of embezzlement, or for the conduct of the master in relation to such goods. *King v. Lenox*, 19 Johns. 235. See also *Butler v. Basing*, 2 C. & P. 613; *Reynolds v. Toppan*, 15 Mass. 370; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 16; *Allen v. Sewall*, 2 Wend. 327, 6 Id. 335; *Walter v. Brewer*, 11 Mass. 99.

employer was the carrier, and the servant his receiver of goods for carriage, and was justified by the main facts of the case in so believing. (i)

* A ship may be a common-carrier, whether in the hands of her owner, or chartered by him to another. But she may be chartered in two ways. If the hirer provides and pays the officers and crew, in this case the owner is not more liable for their acts than if he had sold the ship. (j) If the owner agrees to man the ship, and then the hirer hires ship, officers,

(i) Thus, where the owners of a stage-coach employed a driver, under a contract that he should receive a certain sum of money per month, and the compensation which should be paid for the carriage of small parcels, it was held that the owners would be answerable for the negligence of the driver in not delivering a parcel of that description, intrusted to him to carry, unless this arrangement was known to the proprietor of the goods, so that he contracted with the driver as principal. *Bean v. Sturtevant*, 8 N. H. 146. See also *Allen v. Sewall*, 2 Wend. 327, 6 Id. 335; *Hosea v. McCrory*, 12 Ala. 349; *Chouteau v. Steamboat*, 16 Missouri, 216. See also the late case of *Farmers & Mechanics Bank v. Champlain Transportation Co.* 23 Verm. 186, in which these points are thoroughly considered. See the facts of the case stated *post*, p. 661, n. (u.) One of the points made was whether the defendants were to be held as common-carriers of the bank bills in question. Upon this point, *Redfield, J.*, said:—"It seems to us that when a natural person, or a corporation, whose powers are altogether unrestricted, erect a steamboat, appoint a captain, and other agents, to take the entire control of their boat, and thus enter upon the carrying business, from port to port, they do constitute the captain their general agent, to carry all such commodities as he may choose to contract to carry within the scope of the powers of the owners of the boat. If this were not so, it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce. There is hardly any business in the country, where it is so important to maintain the authority of agents, as in this matter of carrying, by these invisible corporations, who have

no local habitation, and no existence, or power of action, except through these same agents, by whom almost the entire carrying business of the country is now conducted. If, then, the captains of these boats are to be regarded as the general agents of the owners,—and we hardly conceive how it can be regarded otherwise,—whatever commodities, within the limits of the powers of the owners, the captains, as their general agents, assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses, unless, from the course of business of these boats, the plaintiffs did know, or upon reasonable inquiry might have learned, that the captains were intrusted with no such authority. *Prima facie* the owners are liable for all contracts for carrying, made by the captains or other general agents for that purpose, within the powers of the owners themselves, and the *onus* rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. But it does not appear to us that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves."

(j) *James v. Jones*, 3 Esp. 27; *Vallejo v. Wheeler*, Cowp. 143; *Frazer v. Marsh*, 13 East, 238; *Reynolds v. Toppan*, 15 Mass. 370.

and crew, of the owner, the owner alone is in general responsible for the acts of the officers and men in reference to the goods, where he has the actual possession and control of the ship for that voyage. (*k*) The owner of the ship is certainly liable for the acts of those whom he provides and pays, where the goods were laden on board on his credit, trusting to him as the owner of the ship, he knowing this trust, and by his words or conduct authorizing it, and so accepting the responsibility. So an owner of a ferry, who has leased it, and placed the lessee in possession, is not liable for loss of goods in crossing the ferry. (*l*)

SECTION IX.

WHEN THE RESPONSIBILITY ENDS.

As the liability of the carrier begins with the delivery of the goods to him, so it continues until the delivery of the goods by him. For he is bound not only to carry them to their destined place, but to deliver them there to the bailor, or as the bailor may direct. (*m*) And this he must do within *what shall be a reasonable time, judging from all the circumstances of the case; (*n*) and within the proper hours of business, when the goods can be received and properly stored. (*o*)

(*k*) *Parish v. Crawford*, *Strange*, 1251; *Emery v. Hersey*, 4 *Greenl.* 407; *McIntire v. Bowne*, 1 *Johns.* 229.

(*l*) *Ladd v. Chotard*, *Minor*, 366.

(*m*) *Golden v. Manning*, 3 *Wils.* 429, 2 *Wm. Bl.* 916; *Hyde v. Trent and Mersey Navigation Co.* 5 *T. R.* 389; *Wardell v. Mourillyan*, 2 *Esp.* 693; *Storr v. Crowley*, *McCl. & Y.* 129; *Gibson v. Culver*, 17 *Wend.* 305; *Fisk v. Newton*, 1 *Denio.* 45; *Ostrander v. Brown*, 15 *Johns.* 39; *Eagle v. White*, 6 *Whart.* 505; *McHenry v. Railway Co.* 4 *Harring.* 448.

(*n*) *Hand v. Baynes*, 4 *Whart.* 204; *Favor v. Philbrick*, 5 *New Hamp.* 358; *Wallace v. Vigus*, 4 *Blackf.* 260.

(*o*) *Eagle v. White*, 6 *Whart.* 505. In this case the defendants, who were common-carriers on the railroad from

Philadelphia to Columbia, undertook to carry certain boxes of goods belonging to the plaintiffs from Philadelphia to Columbia. The cars arrived at the latter place about sunset on a Saturday evening, and by the direction of the plaintiffs were placed on a siding. The plaintiffs declined receiving the goods that evening, on the ground that it was too late; whereupon the agent of the defendants left the cars on the siding, taking with him the keys of the padlocks with which the cars were fastened, and promised to return on Monday morning. The cars remained in this situation until Monday morning, when they were opened by the plaintiffs by means of a key which fitted the lock; and on examination it was discovered that one of the boxes had been opened,

But if there be delay through an accident or misfortune, and the carrier afterwards delivers the goods as soon as may be, he is not responsible for the effect of the delay, although it was not occasioned by "the act of God or the public ene-

and the contents carried away; *held* that the defendants were liable to the plaintiffs for the value of the goods lost. *Huston, J.*, dissented.—So in *Merwin v. Butler*, 17 Conn. 138, where the defendant, who was a common-carrier, received from the plaintiff a package of money, to convey it from S. to P., and deliver it at the bank in P.; it appeared that when the defendant arrived at P. the bank was shut; that he went twice to the house of the cashier, and not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it; and that the defendant then refused to be further responsible for any loss or accident; it was *held* that, in the absence of any special contract, (none being proved in this case,) these facts did not constitute a legal excuse to the defendant for the non-performance of his undertaking. And *Hinman, J.*, said:—"That there may be circumstances which would excuse a carrier from the delivery of a package is doubtless true, but there is nothing stated in this motion that ought to have that effect. That the bank was shut, when the carrier went there, can amount to nothing, unless it appeared further that he went there at a proper time, during the ordinary business hours; and even then we could not say, as matter of law, that this would be a legal excuse. It would depend upon the degree of diligence which the carrier used, to let the officers of the bank know that he had a package to deliver there. No question of this sort was raised, on the trial below, nor does it appear that there was any foundation on which it could have been." See also *Hill v. Humphreys*, 5 W. & S. 123; *Young v. Smith*, 3 Dana, 91; *Storr v. Crowley*, McCl. & Y. 129. The question, what constitutes a sufficient delivery, is well illustrated by the case of *De Mott et al. v. Laraway*, 14 Wend. 225. The defendant in that case was the owner and master of a canal-boat, and received on board his boat at Troy a hogshead of molasses and other goods belonging to the plaintiffs, to be transported to Kidder's ferry, being a land-

ing-place nearest to Farmersville, where the plaintiffs transacted business. All the goods were safely transported and delivered to the plaintiffs except the hogshead of molasses. The boat arrived at Kidder's ferry, and, in the attempt to hoist the hogshead of molasses into a warehouse, the usual place for the delivery of goods for Farmersville, the fall (part of the machinery for hoisting attached to the warehouse) broke, and the hogshead fell back into the boat, was stove, and most of the molasses lost. At the time of the accident the hogshead was clear of the boat, and almost up to the sill of the door of the warehouse. One of the plaintiffs was present, and had wagons there in which some of the goods were loaded. It was *held* that the defendant was liable for the loss. *Sutherland, J.*, said:—"Laraway was a common-carrier upon the canal, and as such undertook to transport the defendant's goods from Troy to Kidder's ferry. This necessarily included the duty of *delivering* the goods there in safety. They were all thus delivered except a hogshead of molasses, which was stove in the act of being unladen; as they were hoisting it from the boat with a tackle attached to a storehouse upon the bank of the canal, the rope broke, and the hogshead fell back into the boat, and most of the molasses was lost. Although one of the plaintiffs was present, there is no pretence that he had accepted the molasses as delivered previously to the accident, or that he had any thing to do with the delivery. The delivery was not complete when the accident occurred, and the goods were still at the risk of the carrier. It is a matter of no importance that the machinery employed in unloading the boat was attached to and belonged to a store on the bank of the canal, and not to the carrier's boat. It was *pro hac vice* his tackle, and he was responsible for its sufficiency. When the responsibility of a common-carrier has begun, it continues until there has been a due delivery by him." See also *Graff v. Bloomer*, 9 Barr, 114.

my," and might possibly have been prevented; for as to the time of the delivery he is not bound to more than diligence; nor responsible unless for the want of due diligence; his liability as to the time of delivery being quite distinct from his liability for the delivery itself. (p) It seems, however, that if he has made an express agreement to deliver by a specified time, delay caused by unavoidable accident will be no excuse. (pp)

If the consignee refuse to receive the goods, or cannot receive them, or is dead, or absent, this will excuse delay in delivery, but not absolve the carrier from all duty or responsibility; for he is still bound to make all reasonable efforts to place them in the hands of the consignee, and when these are ineffectual, to take care of the goods for the owner, by holding them himself, or lodging them with suitable persons for him; and such persons then become bailees of the owners of the goods. (q)

* But the question of reasonableness of time disappears

(p) *Parsons v. Hardy*, 14 Wend. 215; *Dows v. Cobb*, 12 Barb. 310, 320; *Boyle v. McLaughlin*, 4 H. & Johns. 291; *Hadley v. Clarke*, 8 T. R. 259; *Lowe v. Moss*, 12 Ill. 477. See *Harrell v. Owens*, 1 Dev. & Bat. 273, *contrd.* — But if the carrier is prevented by any cause from delivering goods in due time, his liability to deliver them within a reasonable time, after the cause of detention is removed, still continues. *Id.* Therefore, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her, "until the further order of Council;" it was held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. *Hadley v. Clarke*, 8 T. R. 259.

(pp) *Harmony v. Bingham*, 1 Duer, 209.

(q) *Ostrander v. Brown*, 15 Johns. 39; *Fisk v. Newton*, 1 Denio. 45. In this last case the consignee of certain kegs of butter, sent from Albany to

New York by a freight barge, was a clerk, having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found. It was held that the carrier discharged himself from further responsibility, by depositing the property with a storehouse keeper, then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in that trade, though the butter was subsequently sold by the storehouse keeper, and the proceeds lost to the owner by his failure. And *Jewett, J.*, said: — "When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods." See also *Stone v. Waite*, 31 Maine, 409; *Hemp-hill v. Chenie*, 6 W. & S. 62.

when the parties have made the time certain by their special agreement. Then it must be precisely adhered to. Any delay is a failure, and a breach of contract. (*r*) And where there is a custom which would wholly excuse the carrier from delivering the goods, still, if he make an express promise to deliver, he is bound by this promise, and the custom becomes inoperative.

In general, the delivery of the goods must be to the owner or consignee himself, or to his agent, (*s*) or they must be carried to his residence, or they may be taken to his place of business, where from the nature of the parcels this is the more appropriate place for their delivery. Nor is it sufficient that they are left at the public office of the carrier, unless there be express permission for this, or an usage so established and well known as to be equivalent to such permission. (*t*)

* Usage, so long established, so uniform, and so well known that it must be supposed that the parties to a contract knew it, and referred to it, becomes as it were a part of the contract, and may modify in an important manner the rights and duties of the parties. And in determining what is a sufficient delivery of goods by a carrier, usage has frequently great influence. (*u*) In general, as we have said, the delivery

(*r*) *Hand v. Baynes*, 4 Whart. 204, 214; *Paradine v. Jane*, Aleyn, 27; *Brecknock Co. v. Pritchard*, 6 T. R. 750. But see *Dows v. Cobb*, 12 Barb. 310, 321.

(*s*) See cases cited *ante*, p. 658, n. (*m*.) In *Lewis v. The Western Railroad Co.*, 11 Met. 509, it was *held* that if A., for whom goods are transported by a railroad company, authorizes B. to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A., and B., instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B. in hauling the car to such depot, and B. then requests and obtains leave of that company to use its machinery to remove the goods from the car; then the company that trans-

ported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to A.

(*t*) *Gibson v. Culver*, 17 Wend. 305. In this case it was *held* that it is competent for a carrier to prove that the uniform usage and course of the business in which he is engaged is to leave the goods at his usual stopping-places in the towns to which the goods are directed, *without notice* to the consignees; and if such usage be shown of so long continuance, uniformity, and notoriety, as to justify a jury to find that it was known to the plaintiff, the carrier will be discharged.

(*u*) See *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*, 16 Verm. 52, 18 Id. 131, 23 Id. 186.

must be to the owner or consignee, or his authorized agent. But if the goods are left at his residence, or (such delivery being more appropriate) at his place of business, and this is equivalent to a delivery into his personal possession, it does not seem that any personal notice is necessary. Perhaps it may always be presumed that the owner of goods will receive information if they are left at his house; and if not, that it is his own fault, or if the fault of others, not that of the carrier. But where a delivery by a carrier is made at an owner's house, but not in a usual way, as if the parcel were placed in a dark corner of an entrance or back room, without attracting notice or giving information to any one, this circumstance might indicate either wrongful motive or culpable negligence; and such delivery would not be a sufficient one. It is undoubtedly best in all cases of delivery not to the person himself to give notice to him, or to one certainly authorized to receive notice for him.

Carriers by land usually deliver the goods they transport,

This is one of the strongest cases in the books upon this point. The defendants were common-carriers on Lake Champlain, from Burlington to St. Albans, touching at Port Kent and Plattsburgh long enough to discharge and receive freight and passengers. This action was brought against them to recover for the loss of a package of bank bills. It appeared in evidence that the package in question, which was directed to "Richard Yates, Esq., Cashier, Plattsburgh, N. Y." was delivered by the teller of the plaintiffs' bank to the captain of the defendants' boat, which ran daily from Burlington to Plattsburgh, and thence to St. Albans; and that, when the boat arrived at Plattsburgh, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given by the captain of the boat to the consignee of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered to discharge the defendants from their liability as carriers. The defendants offered evidence to show that a de-

livery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their own uniform usage, and the usage of other carriers similarly situated. The case has been before the Supreme Court of Vermont three times, and that court has uniformly held that, in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendants from all liability. When the case was before the court the last time, *Redfield, J.*, in delivering the judgment, said:—"If the law fixes the extent of the contract, in every instance, in the manner assumed, then, most undoubtedly, are the defendants liable in this case, unless they can show, in the manner required, some controlling usage. But if, upon examination, it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of business at the place of destination, the usage or practice of the defendants, and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself."

by carrying them to the owner, or where he directs. And generally they can do this as easily as bring them into the town where he lives. But this is not the case with one important class of carriers by land; we mean railroads. The freight cars can go only where the rails go, and these terminate in the station-house. If the goods are to be carried farther, they must be laden upon wagons or other carriages for that purpose. Moreover, it is usual for the consignor by railroad to send to the consignee notice of the consignment, and very frequently a copy of a receipt, which seems to take the place of a bill of lading. And the arrival of the goods at a certain hour may usually be calculated upon with great certainty. For all these reasons, and some others, it seems to be usual with railroads not to send the goods out of their depots. (v) There is, perhaps, no objection to this usage

(v) *Thomas v. Boston & Providence Railroad Corp.* 10 Met. 472. This was an action against the defendants as common-carriers to recover for the loss of a roll of leather. It appeared in evidence that four rolls of leather, the property of the plaintiff, were delivered to the defendants at Providence, to be transported to Boston; that they were so transported, and were deposited at the defendants' depot at Boston; that a teamster, employed by the plaintiff, shortly after called at the depot, with a bill of the freight receipted by the defendants, and inquired for the leather; that it was pointed out to him by the defendants' agent, Allen, who had charge of the depot; that the teamster then took away two of the rolls, and soon after called again and inquired for the other two; that he was directed where to look for them; and that he found only one. The court held that, under these circumstances, the defendants were not liable as carriers. *Hubbard, J.*, said: — "The transportation of goods, and the storage of goods, are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot or place of deposit, and delivering

it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unloaded, and put into a place of safety. After such delivery at a depot the carriage is completed. But, owing to the great amount of goods transported, and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unloaded, and deposited in a safe place, protected from the weather, and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unloaded and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common-carriers is, in our judgment, terminated. They have done all they

strengthening itself into law. But we think in that case that the railroad carrier should give notice forthwith, on the arrival of the goods, to the consignee, if his residence is known, or can be found by any reasonable exertions. We think the law should be held to make this requirement, and that any usage against it would be so far against public policy, that it might well be doubted whether it should be permitted to

agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common-carriers being ended, the proprietors are by force of law depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care. In the case at bar, the goods were transported over the defendants' road, and were safely deposited in their merchandise depot, ready for delivery to the plaintiff, of which he had notice, and were in fact in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience. No agreement was made for the storage of the goods, and no further compensation paid therefor; the sum paid being the freight for carriage, which was payable if the goods had been delivered to the plaintiff immediately on the arrival of the cars, without any storage. Upon these facts, we are of opinion, for the reasons before stated, that the duty of the defendants, as common-carriers, had ceased on their safe deposit of the plaintiff's goods in the merchandise depot; and that they were then responsible only as depositaries without further charge, and consequently, unless guilty of negligence, in the want of ordinary care in the custody of the goods, they are not liable to the plaintiff for the alleged loss of a part of the goods." And in *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, it is decided that the rule requiring carriers to make personal delivery to the consignee does not apply to railroads, transportation by which more resembles sea-carriage than carriage by means of wagons

and similar vehicles; that the nature of transportation of freight by railroad is such that the implied contract between the parties is that the company will transport the goods, discharge them from the cars upon a suitable platform, and there deliver them to the consignee if he is ready to receive them, and if he is not that they will place them securely and keep them a reasonable time, ready to be delivered when called for; that from this view of the duty and contract between the parties, the company are first common-carriers, and after that warehouse-men, responsible as the former until the goods are removed from the cars and placed upon the platform, and if, on account of their arrival in the night, or for any reason, the consignee is not then ready to receive them, it is the duty of the company to take care of them, under the liability of warehouse-men or keepers of goods for hire. And the court are strongly inclined to be of the opinion that it is not necessary for the company to give notice of the arrival of the goods, but that the nature of the transportation is such as to dispense with it. — But in *Richards v. The London & C. Railway*, 7 C. B. 839, it was held that where a railway company employ porters at their stations to convey passengers' luggage from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty. That was an action on the case against the defendants for the loss of a package. The first count of the declaration stated that the defendants were the owners and proprietors of a railway, for the carriage and conveyance of passengers and their luggage, &c., from A. to B., for hire; that the defendants were common-carriers for hire in and upon the said railway; that the wife of the plaintiff, at their request, became a passen-

control the law; at least not unless it were quite universal, and well known to all. (*w*)

* Carriers by water cannot usually deliver goods at the residence of their consignees, without land carriage, and the greatest amount of goods carried by water is consigned to persons whose warehouses, or stores, are adapted to receive such goods by being near the water, and generally on the wharves on which they may be landed. Hence a usage prevails very generally to deliver such goods by landing them on a wharf, and giving immediate notice to the consignees. (*x*) And it is held that a carrier by water may

ger in and upon the railway, to be carried and conveyed therein and thereby from A. to B., together with her luggage, consisting of a dressing-case, &c., also to be carried and conveyed by the defendants, as such carriers, in and upon the railway from A. to B., and there, to wit, at the station or terminus at B., safely and securely delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach alleged was, that the defendants, not regarding their duty, did not use due and proper care in and about the carriage and conveyance of the dressing-case from A. to B., but took so little and such bad care in and about the carrying and conveying the same, that by and through the *carelessness, negligence, and improper conduct* of the defendants in the premises, the dressing-case was lost. It was proved that the plaintiff's wife became a passenger by a first class carriage, to be conveyed from A. to B.; that the dressing-case was placed in the carriage under the seat; that on the arrival of the train at B., the porters of the company took upon themselves the duty of carrying the lady's luggage from the railway carriage to the hackney carriage which was to convey her to her residence; and that on her arrival there the dressing-case was missing. *Held*, that the duty of the defendants as common-carriers continued until the luggage was placed in the hackney carriage; and that the evidence entitled the plaintiff to a verdict upon the first count.

(*w*) *Michigan Central Railroad Co. v. Ward*, 2 Mich. 538. See, however, *Farmers' & Mechanics' Bank v. Champlain Transportation Co.* *ante*, p. 661,

n. (u); and *Gibson v. Culver*, *ante*, p. 661, *n. (t)*, that notice may be dispensed with when usage fully warrants it. See also the language of *Hubbard, J.*, quoted in the preceding note, and *Shaw, C. J.*, *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 274.

(*x*) *Dixon v. Dunham*, 14 Ill. 324; *Hyde v. Trent & Mersey Nav. Co.* 5 T. R. 389. In this last case it was *held*, that where common-carriers from A. to B. charged and received for cartage of goods to the consignee's house at B., from a warehouse there, where they usually unloaded, but which did not belong to them, they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allowed all the profits of the cartage to another person, and that circumstance was known to the consignee. This was a case of carriage by land. The ground upon which the defendants were held liable was, that they made a specific charge for cartage from the warehouse where they unloaded to the house of the consignee. The general question, whether a carrier by land is bound to make a personal delivery, was not decided, though all the judges expressed their opinion upon it; — that of Lord *Kenyon* being against such liability, and that of all the others judges being in favor of it. All the judges, however, agreed that a carrier by water, bringing goods from a foreign port, was not bound to make a personal delivery to the consignee. Lord *Kenyon*, in the course of his opinion, said: — "If the defendants here be liable, consider how far the liability of carriers will be extended: it will affect the owners of ships bringing goods from foreign countries to mer-

land his goods at any wharf usually used for landing, and is not bound to take them to that which is nearest, or most

chants in London; are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange, indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf." And *Buller, J.*, said:—"It does not appear to me that the difficulties suggested respecting foreign ships exist. When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land, and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." And, per *Grose, J.*:—"The case of foreign goods brought to this country depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant; by the general custom the liability of ship carriers is at an end when the goods are landed at the usual wharf."—By the custom of the River Thames, the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them. *Catley v. Wintringham, Peake, N. P. 150.* But it has been much contested whether the master is by the usage bound to take care of the lighter, after it is fully laden, until the time when it can be properly removed from the ship to the wharf. At a trial on this question, it was held that the master was not obliged to do this. *Robinson v. Turpin*, cited in *Abbott on Shipping, 335.* When ships arrive from Turkey, and are obliged to perform quarantine before their entry into the port of London, it is usual for the consignee to send down persons, at his own expense, to pack and take care of the goods; and therefore, where a consignee had omitted to do so, and goods were damaged

by being sent loose to shore, it was held that he had no right to call upon the master of the ship for compensation. *Dunnage v. Joliffe*, cited in *Abbott on Shipping, 335.*—The general question as to the duty of delivery, in the case of carriers by water bringing goods from a foreign port, was much discussed in the case of *Cope v. Cordova, 1 Rawle, 203.* *Rogers, J.*, delivered the judgment of the court, as follows:—"The substance of a bill of lading is a formal acknowledgment of a receipt of goods, and an engagement to deliver them to the consignee or his assigns. And this suit is brought on an alleged breach of such a contract, in the non-delivery of a crate of merchandise shipped on board the ship *Lancaster* from Liverpool, and consigned to *Raphael Cordova* in the usual form. The goods were landed on the wharf of the Liverpool packets, and whether this amounts to a delivery to the consignee is the principal question. It must be conceded, that, by the general custom, the liability of shipowners is at an end when the goods are landed at the usual wharf, and this seems to be taken by the whole court as a position not open to dispute, in the strongly contested case of *Hyde v. Trent and Mersey Nav. Co. 5 T. R. 394.* The usage in France, although not uniform in every particular, goes to the whole extent of the English doctrine. At *Rochelle*, when the vessel is moored at the wharf, the merchant freighters, at their own expense and risk, have their merchandise deposited upon the deck of the vessel. From the time when they reach the deck, it is the business of the hands on board to receive and place them in their proper situation. In unlading, the freighters have them taken in like manner from the deck, by their porters, to lower them to the wharf, from which time they are at the merchant's risk, without any liability on the part of the master of the vessel, if they happen to sustain any damage as they are lowered from the vessel. At *Marseilles* it is the business of the master to put the merchandise on the wharf, after which he is discharged. 1 *Valin, 510.* And this rule of the French commercial code is cited with approbation by the learned commentator, in page 636 of his *Trea-*

convenient to the consignee, or that which he specially directs, unless the carrier has previously agreed to obey such

tise on the Marine Ordonnance. As the master, in conformity with the prevailing usage in this respect, upon his arrival deposits in the custom-house a manifest, or general list of the cargo, with a designation of all the individuals to whom each parcel of the merchandise should be respectively delivered, and as there are always officers of the customs who attend to the unloading, to superintend, and make a list of all the merchandise which leaves the vessel, for the purpose of ascertaining whether the manifest of the cargo which has been furnished is accurate and faithful, and by this means the lists of these officers constitute a proof of the landing of the merchandise, it is the end of the engagement which the master has contracted by the bill of lading. If, then, disputes arise, it is only when in the bustle of a hasty discharge mistakes occur on the part of those who convey the merchandise to the warehouses, by introducing articles into one which ought to have gone into another. The error is almost always discovered by ascertaining what parts of the cargo of the vessel have been conveyed to the different warehouses. 'But if it happens,' says the commentator, 'that the error cannot be discovered, the master is always discharged when it appears by the list of the officers of the royal customs that he has caused all the merchandise in his bills of lading to be placed on the wharf.' The ordinances of Rochelle and Marseilles are the text from which, in the manner of our own commentators, he proceeds to deduce the general custom. I understand, from the observations of the commentator, that the usage is not confined to Rochelle and Marseilles, but that in France, as in Great Britain, it is co-extensive with the limits of the kingdom; and in this country we are not without authority to the same purpose. The usage has been found to prevail in a sister city, as appears from a case the name of which is not now recollected, lately determined by Judge Irving, in New York. The same point has also been ruled by the Supreme Court of Massachusetts, in *Chickering v. Fowler*, 4 Pick. 371. A promise by a master of a vessel to deliver goods to a consignee

does not require that he should deliver them to the consignee personally, or at any particular wharf. It is sufficient if he leaves them at some usual place of unloading, giving notice to the consignee that they are so left. There is an obvious policy in commercial nations conforming to the usages of each other, and it is also important that there be a uniformity of decisions in our domestic tribunals on mercantile questions. As there will be great convenience in the local usage conforming to the general custom, it will be incumbent on those who maintain the contrary to make the exception from the rule plainly appear. In unloading a vessel at the port of Philadelphia, it is usual as soon as articles of bulk, such as crates, are brought upon deck, to pass them over the side of the ship, and land them on the wharf. The owners station a clerk on the wharf, who takes a memorandum of the goods, and the day they are taken away, and this for the information of his employers. A manifest or report of the cargo is made by the master, and deposited at the custom-house, and the collector, on the arrival of the vessel within his district, puts and keeps on board one or more inspectors, whose duty it is to examine the contents of the cargo, and superintend its delivery. And no goods from a foreign port can be unladen or delivered from the ship in the United States, but in open day, between the rising and setting of the sun, except by special license; nor at any time without a permit from the collector, which is granted to the consignee upon payment of duties, or securing them to be paid. The holders of a bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and at any rate such arrival is matter of notoriety in all maritime places. The consignee is previously informed of the shipment, as it is usual for one of the bills of lading to be kept by the merchant, a second is transmitted to the consignee by the post or packet, while the third is sent by the master of the ship together with the goods. With the benefit of all these safeguards, if the consignee uses ordinary diligence, there is as little danger in this country as in England and

direction. (y) But in all such cases of landing, and indeed in all cases of delivery of goods by a carrier, in any other

France, of inconvenience or loss, where-as the risk would be greatly increased if it should be the duty of the ship-owner to see to the actual receipt of the goods, and particularly in the case of a general ship with numerous consignments on board, manned altogether by foreigners unacquainted with the language at the port of delivery. I have taken some pains to ascertain the opinion and practice of merchants of the city on this question, which is one of general concern. My inquiries have resulted in this, that the goods, when landed, have heretofore been considered at the risk of the consignee, and that the general understanding has been, that the liability of the ship-owner ceases upon the landing of the goods at the usual wharf. I see no reason to depart from a rule which has received such repeated sanctions, from which no inconvenience has heretofore resulted, and which it is believed in practice has conduced to the general welfare." The learned judge concluded with saying that the court would wish to be understood as giving no opinion on the law which regulates the internal or coasting trade, to which they understood the case of *Ostrander v. Brown*, 15 Johns. 39, to apply; and that they did not consider the present decision as interfering with the principles of that case. It has generally been held, as the learned judge intimates, that the rule is more strict in regard to delivery in the internal and coasting trade than in the foreign trade. Thus, in *Wardell v. Mourillyan*, 2 Esp. 693, which was an action on the case for not delivering an anchor sent by the defendant's hoy, it appeared in evidence that the defendant was the owner of an hoy, which sailed from Deal to Dice's Quay, near London Bridge; that the anchor had been shipped on board this hoy, with a direction to be delivered to Messrs. Bell, Anchram, and Buxton; that the defendant had delivered it at Dice's Quay; that the wharfinger had paid the hoyman the freight, and had given him a receipt for the anchor; and one witness proved that, except in the case of flour, the hoymen never concerned themselves about goods after they had delivered

them at the wharf. Lord *Kenyon*, after making some observations upon the evidence, left it to the jury to say what was the custom; and they found a verdict for the plaintiff. So in *Hemphill v. Chenie*, 6 W. & S. 62. That was an action against the defendant, the owner of a keel-boat on the Ohio river, to recover the price of a box of dry goods delivered to him at Pittsburgh, and consigned to Rowland, Smith, & Co., Louisville. The defendant gave evidence to show that the box of goods in question was carried safely to Louisville, and deposited on the wharf there; and that notice was given to the consignees. The question was whether there was a sufficient delivery. *Grier, J.*, in summing up to the jury, said:—"It is contended that, according to the custom of the port of Louisville and the other cities on these western rivers, the depositing of goods on the wharf, and giving notice to the consignee, constitute a sufficient delivery in law, whether the consignee actually receives the goods or not. In other words, the care and responsibility of the carrier cease the moment he has deposited goods on the wharf and sent notice to the consignee, and this whether the consignee refuses or neglects to receive them or not. If, in such cases, the carrier may abandon the goods on the wharf and the property of the distant owners thus be left as a subject of plunder to the first finder, it must be admitted that the subject is one of considerable interest to those whose property is committed to the chances of transportation on these western waters, and has necessarily to pass through the hands of so many different carriers and consignees. It must be apparent to every one, that however much steamboat men and other carriers on our rivers may affect the diction and phraseology of maritime cities in their bills of lading, insurances, &c., yet that a hasty or indiscriminate application of our commercial and maritime code of laws and customs might not be convenient or judicious. Goods may be 'shipped' on board steamboats and canal-boats from the 'port' of Pittsburgh to the 'port' of Louisville; and yet it might happen

(y) *Chickering v. Fowler*, 4 Pick. 371.

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way than putting them into the actual possession of the consignee, or into his house or store, it is absolutely essential *that notice should be given to the consignee, so that he may forthwith take possession of the goods. (z) We have seen

that the rules of commercial law, which regulate trade on the ocean, and freight shipped from Liverpool to Philadelphia might be very inconvenient of application to our western waters. Hence in *Cope v. Cordova*, 1 Rawle, 203, which decides that 'the liability of the shipowner ceases when the goods are landed at the usual wharf,' many good reasons are given why such a rule exists in the trade between two maritime cities, which cannot apply to this shifting transportation from point to point on our western waters; and the learned judge who delivers the opinion of the Supreme Court in that case is careful to observe, that they do not intend by that decision to interfere with the law that regulates the internal or coasting trade, or at all to dissent from the case of *Ostrander v. Brown*, 15 Johns. 39." The learned judge then proceeded to comment on the unreasonableness of holding such a delivery to be sufficient, and the jury under his instructions found a verdict for the plaintiff. The case was afterwards carried up to the Supreme Court, and that court held the instruction to be correct. To the same effect is *Ostrander v. Brown*, 15 Johns. 39, though the distinction between the internal and coasting trade and foreign trade is not expressly taken. In that case, goods were put on board of the defendant's vessel to be carried to Albany, and, on arriving there, were by the defendant's direction put on the wharf. It was held that this was not a delivery to the consignee, and that evidence of a usage to deliver goods in this manner was immaterial, but that the defendant was liable in an action of trover for such part of the goods as was not actually delivered to the consignee.

(z) This was very authoritatively declared by Mr. Justice Porter, in *Kohn v. Packard*, 3 Louis. 224. "The contract of affreightment," said he, "does not impose on the owner of the vessel the obligation to deliver merchandise shipped on board of her to the consignee, at his residence. It is a contract to carry from port to port, and the

owners of a vessel fulfil the duties imposed on them, by delivering the merchandise at the usual places of discharge. The authorities cited on argument, as well as the reason of the thing, clearly establish this rule. But though the contract does not require the owners of the vessel to deliver the goods at any other place in the port but that where ships generally discharge their cargoes, it is not to be concluded that they have a right to land the goods at these places and release themselves, by doing so, from all further care and responsibility, without giving notice to the person who is to receive them. The authorities on this subject are contradictory. Some of those cited support fully the position that a landing on the wharf is equivalent to a delivery. We should have reviewed them, had not the counsel who argued the case carefully, on the part of the defendant, very properly refrained from pressing the rule to that extent. We have the high authority of Chancellor Kent for saying, that the better opinion is, there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to, or a substitute, for it. The contrary doctrine appears to us too repugnant to reason and justice to be sanctioned by any one who will follow it out to the consequences to which it inevitably leads. Persons to whom goods are sent may be absent from the port when the ship reaches it; they may be disabled by sickness from attending to their business; they may not be informed of the arrival of the vessel. Under such circumstances, or many others similar that may be supposed, it would be extraordinary indeed if the captain were authorized to throw the goods on shore, where they could not fail to be exposed to injury from the weather, and would be liable to be stolen. There would be little difference in such an act and any other that would occasion their loss. Contracts impose on parties not merely the obligations expressed in them, but every thing which by law, equity, and custom, is considered as incidental to the particu-

that leaving goods in the office, or store, or even in the carriage of the carrier, is no delivery *to* him, to make him responsible for them as carrier, unless he has notice of such delivery, that he may forthwith take charge of the goods and provide for their safety. In the same way, no delivery *by* him discharges him from responsibility, unless the party entitled to the goods has, in fact, or by construction of law, such knowledge of the delivery as will enable him to take charge of them at once. The notice must therefore be prompt, and distinct. And indeed it seems to be settled in *England, that the landing of goods upon a wharf, with notice, is not a sufficient delivery of them, unless made so by a distinct and established usage. (a)

lar contract, or *necessary to carry it into effect*. La. Code, 1987. Delivery is not merely an incident to the contract of affreightment, it is essential to its discharge, and as there cannot be a delivery without the act of two parties, it is indispensable the freighter should be apprised when and where the ship-owner, or his agent, is ready to hand over the goods." See also *Northern v. Williams*, 6 Louis. Ann. Rep. 578; *House v. The Schooner Lexington*, 2 N. Y. Legal Observer, 4; *Chickering v. Fowler*, 4 Pick. 371; *Price v. Powell*, 3 Comst. 322; *Michigan Central Railroad Co. v. Ward*, 2 Mich. 538. As to what will constitute a sufficient notice, see *Kohn v. Packard*, 3 Louis. 224.

(a) *Gatliffe v. Bourne*, 4 Bing. N. C. 314. In this case, to a count in assumption, by A. against B., upon a contract by B., safely and securely to carry in a steam-vessel certain goods of A. from Belfast to Dublin, and from Dublin to London, and to deliver the same at London to A. or to his assigns, upon payment of freight,—assigning a breach in the non-delivery of the goods in London, B. pleaded that the goods were put on board under a bill of lading, by which they were made deliverable to A., or his assigns, on payment of freight; that after the arrival of the vessel and goods at London, B. caused the goods to be unshipped, and safely and securely landed and deposited upon a certain wharf at London, there to remain until they could be delivered according to the bill of lading,—the said wharf being a place at which goods con-

veyed in steam-vessels from Dublin to London were accustomed to be landed and deposited, for the use of consignees, and a place fit for such purpose; and that the goods, whilst they remained upon the said wharf, and before a reasonable time for the delivery thereof had elapsed, were accidentally destroyed by fire. It was further pleaded to the same count, that after the arrival of the vessel and goods at London, B. was ready and willing to deliver the goods to A. or his assigns, but that neither A. nor his assigns was or were there ready to receive the same; whereupon B. caused the goods to be landed on the said wharf, there to remain until A. or his assigns should come and receive the same, or until the same could be conveyed and delivered to A. or his assigns, with the like averment as to the said wharf being a usual and a fit place; and that the goods, whilst they remained upon the said wharf, and before A. or his assigns came or sent for the same, and before B. had been requested to deliver the same to A. or his assigns, or a reasonable time for conveying them from the said wharf to A. or his assigns had elapsed, and before the same could be removed therefrom, were accidentally destroyed by fire. The court *held* that both pleas were bad. And *Tindal, C. J.*, said:—"The defendants, in each of the pleas, profess to substitute a delivery at Fenning's wharf, in the port of London, for and in the place of a delivery 'at the port of London, to the plaintiff or his assigns,' as required by the terms of the bill of

If the carrier be a warehouse-man, or if, without being a regular warehouse-man, he has, as most common-carriers have, a place of reception and deposit for his goods, it may often be a question of some difficulty, after the transportation *is completed, whether the carrier retains that character and its peculiar responsibility. The answer, in general, is this. Where, by the known usage and course of business, the goods, when they arrive, are to be placed in the carrier's warehouse or office, and kept there without pay to him until the owner takes them, then his responsibility as carrier ceases upon their arrival and notice to the owner; because keeping them in his office is now for the benefit of the owner of the goods exclusively, as it is for his interest to have them removed, so that they may no longer encumber his office. (b) This reason does not apply, where compensation is made for the storage, distinct from that for transportation. But here the two duties of storing and of carrying are perfectly distinct, made so by the undertaking of the party; and the responsibility which belongs to one of these contracts cannot be extended to the other.

Where there is no usage, nor any special agreement, which requires that the goods should be left in the store or office of the carrier after their arrival, then, as we have seen, he is not justified in keeping them there; it is his duty to deliver them at once. And if he does not deliver them, and

lading; and call upon us to say, by our judgment, that such delivery, under the circumstances stated in each plea, is a good delivery in point of law under the bill of lading. But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case; and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with refer-

ence to the means and accommodation for landing goods at different places; the time of the arrival and departure of the vessel; the state of the tide and wind; interruptions from accidental causes; and all the other circumstances which belong to each particular port or place of delivery. The delivery, therefore, of these goods, not being alleged in the pleas to have been made according to the custom or practice of the port of London, we cannot take notice that it is sanctioned by such practice; and the delivery must therefore stand or fall upon the allegations contained in each plea." s. c. 3 M. & Gr. 643, 7 Id. 850. See also *Dixon v. Dunham*, 14 Ill. 324.

(b) See *ante*, p. 619, n. (r.) and p. 663, n. (v.)

so fails in this duty, he continues liable as carrier; or, if not as carrier, still liable absolutely for loss or injury to the goods while in his possession, because that possession is wrongful. (c) And in some cases of non-delivery the carrier may* be

(c) *Miller v. The Steam Nav. Co.* 13 Barb. 361. In this case goods belonging to the plaintiff were received at the city of New York by the defendants, who were common-carriers on the Hudson river between Albany and New York, to be carried by them to Albany, and there delivered to A., the agent of a line of boats on the Erie canal. The goods were put on board a barge of the defendants, at New York, and taken to Albany, where they arrived on the morning of the 17th of August, 1848. A portion of them were unloaded from the barge, and put into a float in the Albany basin, belonging to the defendants, which was a stationary floating craft, kept for the purpose of receiving goods brought up the river, and from which goods were re-shipped into canal boats to be taken west. While the goods were in the process of being passed from the barge to the float, and before they were delivered to A., they, together with the barge and float, were destroyed by a fire which originated in the city of Albany, and afterwards spread to the piers and shipping. *Held*, that the defendants, having contracted to deliver the goods to A. at Albany, they continued to hold the relation of *common-carriers* until the goods were so delivered, or until a reasonable time should have elapsed after notice to A. of their arrival, and an offer to deliver; and that they were liable for the value. *Held* also, that the defendants were not to be treated as *warehouse-men* of the goods, after the arrival of the barge at the pier at Albany; that they had no right to warehouse the goods, except in case of the absence of A., or his refusal or neglect to receive them, after notice. *Welles, J.*, said:—"It is contended, on behalf of the appellants, that upon the arrival of the barge at the pier at Albany, their relation became changed from common-carriers to that of warehouse-men of the goods in question, and that as there is no negligence imputed to them, and as warehouse-men are only liable in case of negligence, no recovery can be had against them. The contract of shipment was to deliver the goods to

F. M. Adams, the agent, at Albany, of the Rochester city line, which line the respondent had selected for their transportation west of Albany; and, in my judgment, the appellants continued to hold the relation of common-carriers in reference to the goods, until they were so delivered, or until a reasonable time should have elapsed after notice to the agent of their arrival, and an offer to deliver. We so ruled on a similar question in the case of *Goold and others v. Chapin and Mallory*, 10 Barb. 612. The appellants had no right to warehouse the goods, unless in case of the absence of the person authorized to receive them, or his refusal or neglect to receive them, after reasonable notice. If the contract was to deliver them to Adams, they had no more right to store them at Albany than at New York, or any intermediate point on the river, unless for one of the reasons mentioned. The legal obligations and liabilities of the appellants, as common-carriers, were fastened upon them from the time they received the goods in New York, until they had performed the service which the transaction implied, and delivered them agreeably to their contract, unless prevented by the conduct of the owner or his agent. There does not appear to have been any notice given to Adams of the arrival of the goods: no offer to deliver them to him; no act on the part of the appellants, indicating that they desired or intended to change their character from common-carriers to that of warehouse-men. Adams went on board the barge some two or three hours after its arrival, and saw the trip book. He testifies that he had a boat near by, ready to take the goods from the float, upon which, as appears by the testimony of the captain of the barge, it was the invariable custom of the defendants to ship goods brought by them up the river, before they were delivered on board the canal boats. The goods in question were in the process of being passed from the barge to the float, and before it was completed, and while a portion of them was in the float and the residue in the

sued in trover, as having converted the goods to his own use. (*d*)

In general, when the owner or consignee may be considered as himself taking charge of the goods, or when his acts or language justify the carrier in believing that the owner considers himself as in charge of them, then the responsibility of the carrier ends. (*e*)

The particular obligation of stage-coach proprietors, railroads, and the like, to deliver the baggage of their passengers, has been much considered. These carriers are, principally, carriers of passengers, and only incidentally of the baggage of the passengers, for which they do not generally receive any distinct compensation. Nevertheless they are held very strictly, both from the nature of the contract and from motives of public policy, to the obligation of delivering the baggage of each proprietor to him at the end of the journey, in all cases. (*f*) And if such delivery be made erroneously, but innocently, on a forged order, the carrier is still held. (*g*)

As the carrier is bound to deliver the goods, so the owner is bound to receive and remove them, and pay the freight for them. And if the carrier is warranted in delivering the goods by keeping them at his own office or warehouse and giving

barge, the fire drove away the hands engaged, and destroyed both the barge and float, with all the goods they contained. Under these circumstances, it is preposterous to contend that there was any thing like an attempt or intention to store the goods, or any occasion or justification for storing them, if such had been the intention. On the contrary, the appellants were merely preparing and getting ready to deliver them, but had not commenced the delivery. They were not in fact ready or in a situation to commence the delivery. The goods were still in their possession as common-carriers, to all intents and purposes." See also *Goold v. Chapin*, 10 Barb. 612.

(*d*) *Bullard v. Young*, 3 Stewart, 46. A. undertook to carry certain flour for B. to a certain place, and having deposited it by the way, C. took part of it by mistake. B. refusing to receive part only, C. received the remainder, and

paid A. for the whole. This was held to amount to a conversion by A., for which B. could maintain trover against him. And per *White, J.*:—"Young was a bailee or carrier, who undertook to deposit the flour at a particular place for the plaintiff. This he did not do, but wilfully and of his own accord left it at another place, whence it was innocently taken by a third person, who paid him, the defendant, for it." See *Rooke v. Midland Railway Co.* 14 E. L. & E. 175.

(*e*) *Thomas v. B. & P. Railroad Corporation*, 10 Met. 472; *Strong v. Nally*, 4 B. & P. 16; *Eagle v. White*, 6 Whart. 505; *Lewis v. The Western Railroad Corp.* 11 Met. 509.

(*f*) *Richards v. The London &c. Railway*, 7 C. B. 839; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Bomar v. Maxwell*, 9 Humph. 621.

(*g*) *Powell v. Myers*, 26 Wend. 590.

notice, and if he has given such notice, and the owner delays more than a reasonable time to take them, they are no longer at the risk of the carrier, as a carrier*, but as a mere depositary, gratuitously, or for compensation, according to the circumstances. (*h*) So if the freight be not paid, and the carrier* retains the goods therefor, they are not at his risk as carrier, but as warehouse-man, or gratuitous bailee. (*i*)

If the owner of goods gives new directions as to their delivery, after they are taken by the carrier, of course these directions may be followed by him. And if they are indefinite, or if they require the carrier to be governed by information or directions which he does not receive, he may discharge himself from the obligation of delivery by storing them for the owner, in the best way he can. (*j*) So the carrier is discharged by any new agreement made between him and the owner or shipper, or by the consent of the owner or shipper to some other disposition of them; which may be express or implied. (*k*) And the shipper may accept the goods at some

(*h*) *Powell v. Myers*, 26 Wend. 591, per *Verplanck*, Senator. In *Goold v. Chapin et al.*, 10 Barb. 612, the defendants, the proprietors of the Hudson River line of towboats, received on board one of their barges, in the city of New York, goods belonging to merchants in Brockport, to be by them transported to Albany, and there delivered to the agent of a company for transporting goods, &c., on the canal, styled "The Atlantic Line." The goods arrived safely at Albany, on Monday the 14th August, and were put on the float belonging to the owners of the barge, which they kept in the Albany basin for the purpose of receiving goods brought by their barges, and then transferring them to the canal craft, which came alongside of the float to receive their loading. On the 15th of August, the agent of "The Atlantic Line" was notified, on behalf of the proprietors of the Hudson River line, that there were goods on their float for his line, and he was requested to call and take them away. The like notification and request were made to him on the next day, and repeated again on the 17th August, when the agent said he was taking some goods from another line,

and when he got them on he would shove up to the float and take those goods on. But on the same afternoon, the float, with the goods in question, was consumed by fire. The court held that, under the circumstances, the strict liability of the defendants, as common-carriers, had ceased at the time of the fire, and that they were then holding the goods as bailees in deposit merely; and the goods having been destroyed without any fault on their part, that they were not liable.

(*i*) *Storr v. Crowley, McClel. & Y.* 129.

(*j*) *Boyle v. McLaughlin*, 4 H. & J. 291.

(*k*) Thus, if A., for whom goods are transported by a railroad company, authorizes B. to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A., and B., instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods, to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B. in hauling the car to such depot, and B. there requests and obtains leave of that company to

place short of that to which they should have been carried, and at which by the original contract delivery should have been made. And such acceptance, whatever be the motive for it, discharges the carrier, if it be voluntary, and if it be made before any cause of action has arisen against the carrier, for non-delivery, or other default. (l) After such cause *exists by reason of the injury that has been inflicted, nothing discharges the carrier but a release, or the receipt of something by way of accord and satisfaction. (m)

If the owner or shipper, by his illegal act, prevents or interferes with the delivery of the goods by the carrier, the obligation of delivery is at an end. But only an actual illegality has this effect. (n) An alleged one, if it be not true

use its machinery to remove the goods from the car; then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to A. *Lewis v. The Western Railroad Corp.* 11 Met. 509. And *Dewey, J.*, said:—"The duty of the defendants was to transport the article, and deliver it at their depot. But this duty may be modified as to the manner of its performance. The omission of the defendants to remove goods from the cars and place them in the warehouse, or upon the platform, would not, in all cases, subject them to an action for non-delivery, or for negligence in the delivery. Suppose a bale of goods was transported by them, and, on its arrival at the depot, the owner should step into the car, and ask for a delivery there, and thereupon the goods should be passed over to him, in the car. The delivery would be perfect; and if any casualty should subsequently occur, in taking out the bale, the loss would be his. The place and manner of delivery may always be varied with the assent of the owner of the property; and if he interferes to control or direct in the matter, he assumes the responsibility." See *Scotthorn v. South Staffordshire Railway Co.* 18 E. L. & E. 553.

(l) *Parsons v. Hardy*, 14 Wend. 215;

Harris v. Rand, 4 New Hamp: 259, 555; *Welch v. Hicks*, 6 Cow. 504; *Lorent v. Kentring*, 1 N. & McC. 132; *Hunt v. Haskell*, 24 Maine, 339. But the goods must be voluntarily received. *Rossiter v. Chester*, 1 Doug. [Mich.] 154. And in *Lowe v. Moss*, 12 Ill. 477, it was held that the receipt by the owner of a part of a lot of goods *in transitu*, though it would discharge the carrier, from all further liability as to such part would not so discharge him as to the residue.

(m) *Willoughby v. Backhouse*, 2 B. & C. 821; *Baylis v. Usher*, 4 M. & P. 790; *Bowman v. Teall*, 23 Wend. 306.

(n) *Gosling v. Higgins*, 1 Camp. 451. This was an action for the non-delivery of ten pipes of wine, shipped at the island of Maderia, on board a vessel of which the defendant was owner, to be carried to Jamaica, and from thence to England. When the vessel arrived off Jamaica, she was seized, with her cargo, for a supposed violation of the revenue laws, and there condemned; but, upon an appeal to the Privy Council in England, the sentence of condemnation was reversed. Upon these facts, *Lord Ellenborough* held that the defendant was liable, and must seek his remedy against the officers of government. So in *Spence v. Chadwick*, 10 Q. B. 517, which was assumed by a shipper on a contract of affreightment. The declaration stated that the plaintiff had shipped on board the defendant's ship, then in the bay of Gibraltar, and bound for London, calling at Cadiz, certain goods to be safely conveyed to London,

in fact, does not discharge the carrier; but if, though not true in fact, or although the cause of a seizure or other interference with the goods which prevents their delivery is not substantiated, yet if there be a justifiable cause for such seizure, it would seem reasonable that the carrier should not be held responsible for the consequences. It would certainly be unjust to hold him so, where it was the fault of the owner or shipper that such apparent cause for seizure existed.

* Nor is the carrier liable where the goods are thrown overboard from necessity, to save life or property; (o) if to save property, all the property that is saved must contribute to make up the loss, under, what is termed in the mercantile law, a general average. (p) Nor if the goods perish from

and there delivered in good order, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, &c., excepted, the plaintiff paying freight. The declaration then averred a promise by the defendant so to convey and deliver the cargo, saving the above exceptions; and alleged as a breach that he failed to do so. The defendant pleaded that the ship in the course of her voyage called at Cadiz, and was then within the jurisdiction of the officers of customs there, and of a certain court of Spain, (described in the plea); that while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, against the will and without the default of the defendant, on a charge of suspicion of their being contraband according to the law of Spain, and were confiscated by a decree of the said court, upon the charge aforesaid. Upon demurrer, the court held that the plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer; and that it did not appear by the plea to have been incurred through any fault of the plaintiff.

(o) *Mouse's case*, 12 Co. Rep. 63; *Bird v. Astcock*, 2 Bulst. 280; 2 Rol. Abr. 567; *Halwerson v. Cole*, 1 Spears, 321. In *Kenrig v. Eggleston*, Aleyn, 93, it is said that *Rolle*, C. J., cited one *Barcroft's case*, "where a box of jew-

els was delivered to a ferryman, who, knowing not what was in it, and being in a tempest, threw it overboard into the sea; and resolved that he should answer for it." But Sir *William Jones*, in commenting upon this case, says:—"I cannot help suspecting that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough to have been kept longer on board than other goods; for in the case of *Gravesend barge*, cited on the bench by Lord *Coke*, it appears that the pack which was thrown overboard in a tempest, and for which the bargeman was held *not answerable*, was of great value and great weight; although this last circumstance be omitted by *Rolle*, who says only, that the master of the vessel had *no information of its contents*." See *Jones on Bailm.* 108.

(p) But the owners of goods shipped on deck, and thrown overboard in a storm, are not entitled to general average; nor is the owner of the vessel liable for them as carrier, in such case. *Smith v. Wright*, 1 Caines, 43; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178. But in *Gillett v. Ellis*, 11 Ill. 579, where goods, stowed on the *main deck* of a *propeller*, were necessarily cast overboard, in a tempest, by the order of the master, to preserve the vessel and crew, it was held that the owner of the goods was entitled to the benefit of a general average. And per *Treat, C. J.*:—"It is insisted that the plaintiff cannot claim contribution, because his goods were

inherent defect, (*q*) nor if the owner or shipper has been negligent or fraudulent in not disclosing the peculiar nature of goods requiring peculiar care, by the want of which care they have perished or suffered injury. (*r*) But the carrier is bound to take all such reasonable care of goods as he knows or should know to be necessary for them.

If the carrier, on the ground of his liability for damages to the goods he undertook to transport, pays for such damages, it is equivalent to a delivery of them in safety, and reestablishes his claim for freight. (*s*)

SECTION X.

WHERE A THIRD PARTY CLAIMS THE GOODS.

One question in regard to the carrier's obligation to deliver goods to the shipper or consignor, has been much agitated,

stowed on the deck of the vessel. The general rule undoubtedly is, that the owner of the goods which are placed on the deck of a ship, and are swept overboard by the action of the wind or waves, or cast into the sea by command of the master, in order to protect the vessel and crew, is not entitled to the benefit of a general average. The cargo on deck, from its situation, increases the difficulty of navigating the ship, and is more exposed to peril than that which is under cover; and, if swept away or cast overboard, the owner must bear the loss, without contribution from the owners of the vessel and the cargo under hatches. But this case does not fall within the operation of this rule. Propellers are a class of vessels but recently introduced in the navigation of the lakes, to which, from the peculiarity of their construction, and the general usage respecting them, this general rule is not applicable. They are double deckers, with two holds. By the general custom prevailing in reference to them, goods stowed on the main deck, or upper hold, are regarded as under hatches, and as safe as those stowed in the lower hold, or where the cargo in

ordinary vessels is only considered as under cover. The master is allowed, by this general custom, to stow the cargo either in the hold or on the main deck, at his convenience. No distinction is made in the price of transportation by the carrier, or in the rates of insurance by the underwriter. The cargo below and between decks is put on the same footing. This universal usage, resulting from the character of the vessel, must govern the rights and liabilities of the owners of the vessel and cargo. The owner of goods, which are stowed on the main deck of a propeller, and necessarily cast overboard by the direction of the master, to preserve the vessel and crew, is, therefore, entitled to the benefit of a general average, as much as the owner of goods that are stowed in the hold would be, under like circumstances."

(*q*) *Farrar v. Adams*, Bul. N. P. 69; *Clark v. Barnwell*, 12 How. 272.

(*r*) *Edwards v. Sherratt*, 1 East, 604; *Titchburne v. White*, 1 Str. 145; *Batson v. Donovan*, 4 B. & Ald. 21.

(*s*) *Hammond v. McClures*, 1 Bay, 101.

and perhaps is not quite settled. It arises in the case of another party claiming the goods as owner, and taking them in that character from the carrier. Will such taking excuse the carrier for non-delivery? If the goods are demanded from him by a third party on this ground, can he deliver the goods and justify his conduct? It is quite certain that the carrier cannot himself raise the question of title in a third person, and on that ground refuse delivery to the party originally holding them. (t) And it is undoubtedly the general rule, that the carrier cannot deny the title of the party from whom he has received the goods for transportation. In * general, no agent can defend against the action of his principal by setting up the *jus tertii* in his own favor. (u) On the other hand, if the carrier delivers them to a third party, and it can be shown in an action against him that this third party was the actual and lawful owner, and that the plaintiff, who delivered the goods to the carrier, had no right to them whatever, this certainly is a sufficient defence. (v) It

(t) *Anon.*, cited in *Laclouch v. Towle*, 3 Esp. 114. This was a case tried before Mr. Justice Gould, and was to the following effect. A carrier had a parcel of goods delivered to him, to be carried from Maidstone to London. While the goods lay at his warehouse, a person came there who said the goods were his, and claimed them from the carrier; the carrier said he could not deliver them; but that if he was indemnified he would keep them, and not deliver them according to order. An indemnity was given; and the goods not being delivered according to order, the party by whom they were delivered to the carrier brought an action against the carrier. The learned judge would not permit him to set up any question of property out of the plaintiff; and *held*, that he having received the goods from him, was precluded from questioning his title, or showing a property in any other person. And Lord *Kenyon*, before whom the case was cited, admitted it to be law. See also *ante*, p. 621, n. (z.)

(u) *Nickolson v. Knowles*, 5 Mad. 47; *Myler v. Fitzpatrick*, 6 Mad. & Geld. 360; *Dixon v. Hamond*, 2 B. & Ald. 310; *Roberts v. Ogilby*, 9 Price, 269; *Hardman v. Willcock*, 9 Bing.

382, n. a.; *Bates v. Stanton*, 1 Duer, 79.

(v) This was settled, after much consideration, in *King v. Richards*, 6 Whart. 418. The defendants in that case were common-carriers of goods between New York and Philadelphia, and had signed a receipt for certain goods as received of A., which they promised to deliver to his order. In trover by the indorsees of this paper, who had made advances on the goods, it was *held*, that the defendants might prove that A. had no title to the goods; that they had been fraudulently obtained by him from the true owner; and that upon demand made, they had delivered them up to the latter. *Kennedy, J.*, said:—"It is said that it would be a breach of trust or an act of treachery, on the part of the bailee, to deliver the goods, even on demand, to the true owner, notwithstanding he has received them from a wrongdoer, because he promised to restore the goods to such wrongdoer. If the bailee in such case receive the goods from the bailor innocently, under the impression made by the bailor that he is the owner thereof, or has the right to dispose of them in the manner he is doing, and therefore promises to return the goods to the bailor, it is very obvi-

is held, in general, that if he does not yield to an adverse claim by a third party, he is liable to an action, in case the title of this party be good. (*w*) The carrier may have his *interpleader in equity to ascertain who has the right; but it is not easy to see what adequate means of self-protection he has at common law. And yet he should be permitted, in

ous that such a promise ought not to be regarded as binding, because obtained through a false impression, made wilfully by the bailor; and truth, which lies at the foundation of justice, as well as all moral excellence, would seem to require, in every such case, that the goods should be delivered up to the true owner, especially if he demand the same, instead of the wrongful bailor. But if the bailee knew at the time he received the goods, and made the promise to redeliver them to the bailor, with a view to favor the bailor, that the latter had come wrongfully by them, either by having taken them tortiously or feloniously from the owner, then the bailee thereby became a participant in the fraud or the felony, and it would be abhorrent to every principle of justice that he should be protected under such circumstances against the demand or claim of the owner. This promise, however, of the bailee, is said to be binding on him only, and is not such as his personal representatives are bound to regard; and the reason assigned for this is because the goods have come to their possession by operation of law. This doctrine, if it were to be allowed, would certainly be singularly anomalous, and unlike, in its effect, to any other promise recognized by the law as binding." See also *Bates v. Stanton*, 1 Duer, 79.

(*w*) *Wilson v. Anderton*, 1 B. & Ad. 450. In this case the captain of a ship, who had taken goods on freight, and who claimed a lien upon them, but whose claim was unfounded, delivered them to the defendant as his bailee. The plaintiff, who was the owner of the goods, demanded them of the defendant, but he refused to deliver them without the directions of the bailor. The court held that the bailor not having any lien upon the goods, the refusal of the bailee was sufficient evidence of a conversion. Lord *Tenterden*, C. J.,

said:—"A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may, therefore be tried in an action against the bailee, and a refusal like that stated in this case has always been considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor must stand or fall, by his title." *Littledale, J.*:—"The question is, whether, under the circumstances stated in this case, the bailee can set up any title against the real owner? What is the situation of a bailee? He has no other title except that which the bailor had. As to the *nisi prius* case before *Gould, J.*, [see *ante*, n. (*t*).] it is not applicable to the present point. There the carrier, on the goods being demanded by a third party, voluntarily identified himself with that party, by proposing to retain them on an indemnity, and offering to set up the title of that party on an action by the bailor. Now a lessee cannot dispute the title of his lessor at the time of the lease, but he may show that the lessor's title has been put an end to; and therefore in an action of covenant by the lessor, a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to dis-train or bring an ejectment, by a person having good title would be equivalent to an actual eviction. So here if the bailor brought an action against the defendant as bailee, the latter might, on the same principle, show that the plaintiff recovered the value of the goods, or that, on being threatened with an action by a person who had good title to the goods, he had delivered them to him."

some way, to demand security of the party whose title seems to him the better and to whom he is therefore willing to give the goods. And whenever security is refused, there should be no recovery against him, unless the better title of the person claiming the goods was obvious and certain, or there were other circumstances indicating that the carrier had not acted with entire good faith or proper discretion. But, in the present state of the authorities, it seems that if the carrier be called upon by such antagonistic claimants, he must decide between them at his own peril.

If the goods are stopped *in transitu*, this would involve questions which could be answered only by the law of "stoppage *in transitu*," which is elsewhere considered.

SECTION XI.

COMPENSATION.

This is sometimes fixed by law; as for incorporated companies, ferries, &c. Where it is not so fixed, the carrier may *determine it himself. But having adopted and made known a usual rate, he is so far bound by it, that on tender of this rate he must receive the goods, and can recover no more if they are not prepaid and he carries them; and whether it be fixed by law, or by his own established usage, it must be applied equally and indifferently; all persons being charged the same price for carriage of the same quantity the same distance. (x) Where, however, it is not fixed by law, the carrier may change it at his discretion, and all parties are bound who have, or might have but for their own fault, seasonable knowledge of such change. If the hire to which he is entitled be not paid, he is not bound to deliver the goods, and if he now retains them in his warehouse or place of business, he is liable, in case of loss or injury, only for negli-

(x) See *ante*, p. 650, n. (t.) It seems that although a carrier need not receive goods until the price of carriage is paid, yet if he does so receive them he can maintain no action for their carriage until the goods are delivered. *Barnes v. Marshall*, 4 E. L. & E. 45.

gence. His liability is no longer that of a common-carrier, but that of a depositary for hire or gratuitously, as the case may be. (y) For he now holds the goods by virtue of the right we shall now proceed to consider.

SECTION XII.

OF THE LIEN AND AGENCY OF THE CARRIER; AND HIS RESPONSIBILITY BEYOND HIS OWN ROUTE.

Whether a private carrier has a lien on the goods for his freight, is not, as we have already said, determined by the authorities. Generally, perhaps, it has been considered that one of the distinctions between the private carrier and the common-carrier is, that the first has no such lien, while the latter has, and has had for centuries. (z) No part of the law of bailments is more firmly established than that the common-carrier has this lien. He may not only refuse to carry goods unless the freight is paid to him, but if he carry them, and the freight is withheld, he may retain the goods, and obtain his freight from them in any of the ways in which * a party enforces a lien on personal property. (a) And while he holds them on this ground, they are not at his risk as a common-carrier, for he is responsible only as any other party who holds property as security for debt.

It has been questioned whether a common-carrier, who

(y) *Young v. Smith*, 3 Dana, 91. See *ante*, p. 674, n. (i).

(z) *Skinner v. Upshaw*, 2 Ld. Raym. 752; *Hunt v. Haskell*, 24 Maine, 339; *Hayward v. Middleton*, 1 So. Car. Const. Rep. 186; *Ellis v. James*, 5 Ohio, 88; *Bowman v. Hilton*, 11 Ohio, 303.

(a) See *Hunt v. Haskell*, 24 Maine, 339; *Fox v. McGregor*, 11 Barb. 41.—A relinquishment of possession by a carrier, or other person who has a lien on property, is an abandonment of the lien. By a transfer of the possession the holder is deemed to yield up the security he has by means of the custody of the property, and to trust only to the responsibility of the owner, or other per-

son liable for the charge. *Bailey v. Quint*, 22 Verm. 464; *Forth v. Simpson*, 13 Q. B. 689; *Bigelow v. Heaton*, 6 Hill, 43, 4 Denio, 496. But, *semble*, per *Beardsley, J.*, that the lien may be retained after delivery by the agreement of the parties. *Id.* And it is so held in *Sawyer v. Fisher*, 32 Maine, 28. So if a carrier be induced to deliver goods to the consignee, by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm the delivery, and sue the consignee in replevin. *Bigelow v. Heaton, supra.*

carries goods of a party, but without his order or knowledge, can maintain a lien for the freight. Generally, the owner would have the right to refuse such service, and to require that the goods should be replaced, or he might have his action for intermeddling with his property. But if the facts were such as to leave to the owner only the option between receiving his goods or rejecting them, must he either refuse the goods, or by accepting give the carrier all the rights which he would have had if he had himself placed them in the hands of the carrier? If a thief in Albany steals one hundred barrels of flour from an owner who intends to send it to Boston, and the thief, for his own purposes, sends it by railroad to Boston, and there the owner's agent discovers the flour, and recognizes it by marks and numbers, can the owner or the owner's agent get possession of the flour, only by paying the freight, and so discharging the lien of the railroad? If a service has been distinctly rendered to the owner, and he accepts that service and holds the benefit of it, on general principles he must pay for it. Whether that rule would apply here would depend upon the peculiar circumstances of the case. But if it would, it does not follow that the carrier is entitled to his lien. He may have a rightful claim for freight, which he may otherwise enforce, but still have no lien for it on the goods transported. If the lien be connected with his peculiar obligation to carry for all who *offer, (b) and his peculiar responsibility as an insurer against every thing but the act of God or the public enemy, these three, the lien, the obligation, and the responsibility, existing only together, and in dependence on each other, then it would follow that he has no such lien, unless he was under a legal obligation to carry the goods for the thief. Such an obligation, in the present extension of our internal interchange of property, and with the existing facilities of locomotion, would make the common-carrier the most efficient assistant of the thief. We cannot doubt that he may always

(b) "The doctrine of lien originated in certain principles of the common law, by which a party, who was *compelled* to receive the goods of another, was also entitled to retain them for his indemnity; thus carriers and innkeepers had, by the common law, a lien on the goods intrusted to their charge." Smith's Merc. Law, 558.

inquire into the title of one who offers him goods; that he must so inquire if there be any facts which would excite suspicion in a man of ordinary intelligence and honesty; and that if the person offering the goods is neither the owner nor his authorized agent, the carrier is under no obligation to receive and carry them. And then again it follows, that if he carries goods for one who is neither the owner nor his agent, he carries where he was under no obligation to carry, and therefore cannot maintain his carrier's lien for the freight. This conclusion seems to us, on the whole, most conformable to the prevailing principles of law, and to the actual condition of the carrier's business in this country, and to the present weight of authority. (c)

(c) This question has been considerably discussed within the last few years. We have already seen that an innkeeper in such a case has a lien. See *ante*, p. 632, n. (r.) See also *Fitch v. Newberry*, 1 Doug. [Mich.] 1, where the court say:—"There is an obvious ground of distinction between the cases of *carrying* goods by a common-carrier, and the furnishing *keeping* for a horse by an innkeeper. In the latter case, it is equally for the *benefit* of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief, or by himself or agent; in either case food is necessary for the preservation of his horse, and the innkeeper confers a *benefit* upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods by carrying them to a place where perhaps he never designed, and does not wish them to go? Or, as in this case, is the owner of goods benefited by having them taken and transported by one transportation line, at their own price, when he had already hired and paid *another* to carry them at a *less* price?" The first case in which the same question arose, in regard to a carrier, is that of the Exeter carrier, cited by Lord Holt, in *Yorke v. Grenaugh*, 2 Lord Raym. 866. There it appeared that one A. stole goods, and delivered them to the Exeter carrier to be carried to Exeter. The right owner finding the goods in the possession of the carrier, demanded them of him; upon which the carrier refused to deliver, without being paid

for the carriage. The owner brought trover, and it was *held* that the carrier might justify detaining the goods against the right owner for the carriage, for when A. brought them to him, he was obliged to receive them and carry them; and therefore, since the law compelled him to carry them, it would give him a remedy for the premium due for the carriage. The decision evidently met with the approval of Lord Holt. On the authority of this case, the opinion seems generally to have prevailed in the profession and among text-writers, that innkeepers and common-carriers stand upon the same ground in this respect. See *King v. Richards*, 6 Whart. 423. But several late cases seem to have established the contrary doctrine, in this country at least, in accordance with what we have stated in the text. The first case, since that of the Exeter carrier, in which this question has been directly considered, is *Fitch v. Newberry*, 1 Doug. [Mich.] 1, already cited. The plaintiffs in that case, by their agents, shipped goods at Port Kent, on Lake Champlain, consigned to themselves at Marshall, Michigan, care of H. C. & Co., Detroit, by the New York and Michigan Line, who were common-carriers, and with whom they had previously contracted for the transportation of the goods to Detroit, and paid the freight in advance. During their transit, and before they reached Buffalo, the goods came into the possession of carriers doing business under the name of the Merchants' Line, without the

It is settled that when the carrier cannot find the consignee, or learns that he is a swindler, and would cheat the

knowledge or assent of the plaintiffs, and were by them transported to Detroit, consigned by H. P. & C. of Buffalo to the care of the defendants, and delivered to the defendants, who were personally ignorant of the manner in which they came into the possession of the Merchants' Line, and of the contract of the plaintiffs with the New York and Michigan line, although they, and also H. P. & Co., were agents for and part owners in the Merchants' Line. The defendants, being warehouse-men and forwarders, received the goods and advanced the freight upon them from Troy, N. Y., to Detroit. On demand of the goods by the plaintiffs, the defendants refused to deliver them, until the freight advanced by them, and their charges for receiving and storing the goods, were paid, claiming a lien on the goods for such freight and charges. The plaintiffs thereupon brought replevin. And the court, after much consideration, *held* that the plaintiffs were entitled to the possession of the goods without payment to the defendant of such freight and charges, and that the defendants had no lien for the same. This decision is supported by the case of *Van Buskirk v. Purinton*, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner, he brought trover, and was allowed to recover the value, although the defendant insisted on his right of lien for the freight. See also *Collman v. Collins*, 2 Hall, 569. The same point arose directly in the late case of *Robinson v. Baker*, 5 Cush. 137, in which *Fletcher, J.*, after reviewing and commenting upon the authorities which we have cited, says:—"Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Salts v. Everett*, 20 Wend. 267, 275, it is said:—"The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor." There is no case to

be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded, by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent. Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others, apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the

consignor, he is bound to protect the owner and consignor, and for that purpose to hold the goods, or store them in some proper way for his use. (d)

The carrier may also be a factor to sell for the owner; and this by express instructions, or by usage of trade. (e) When this is the case, after the carrier has transported the goods, and is engaged in his duty as factor for sale, he is responsible only as factor, or for his negligence or default, and not as carrier. But after he has sold the property, and has received the price which he is to return to the owner, his responsibility as a carrier revives, and in that capacity he is liable for any loss of the money. (f)

freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of *King v. Richards*, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods. The common-carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the persons from whom he receives the goods?"

(d) *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Br. & Bing. 177.

(e) *Stone v. Waitt*, 31 Maine, 409; *Williams v. Nichols*, 13 Wend. 58; *The Waldo*, Davies, 161.

(f) Thus, where the owners of a steamboat, which ran upon the Ohio river, took produce to be carried and sold by them for a certain freight, and were bringing back in the same vessel the money which they obtained on the sale of the produce, when the vessel and the money were accidentally consumed by fire; it was held that under the usage of trade in the western waters, they were acting as common-carriers in going, as factors in selling the produce, and as common-carriers in bringing back the money, and were liable for its loss, notwithstanding the accident. *Harrington v. McShane*, 2 Watts, 443. And

per *Sergeant, J.*:—"The question of the defendant's responsibility in the present case depends on the character in which they held this money when the loss occurred. If they were merely factors they are not responsible; if they were carriers, the reverse must be the case. Had the flour been lost in the descending voyage, by a similar accident, there could be no doubt whatever of the defendant's liability; they were certainly transporting it in the character of carriers. On their arrival at the port of destination, and landing the flour there, this character ceased, and the duty of factor commenced. When the flour was sold, and the specific money, the proceeds of sale, separated from other moneys in the defendants' hands, and set apart for the plaintiffs, was on its return to them by the same boat, the character of carrier re-attached. The return of the proceeds by the same vessel is within the scope of the receipt and of the usage of trade, as proved, and the freight paid may be deemed to have been fixed with a view to the whole course of the trade, embracing a reward for all the duties of transportation, sale, and return. If the defendants, instead of bringing the money home in their own vessel, had sent it on freight by another, there would have been to the plaintiffs the responsibility of a carrier, and there ought not to be less if they chose to bring it themselves. If they had mixed the money with their own, they would have no excuse for non-payment. The defendants can be relieved from responsibility only by holding that the character of carrier

The common principles of agency apply to the carrier; he is liable for the acts of those whom he employs and authorizes to act for him. But a party may contract with the servant alone, and then can hold him only. (g)

The question, when the carrier is liable beyond his own route, has been recently much considered, and is not yet quite settled. If carriers for different routes, which connect together, associate for the purpose of carrying parcels through the whole line, and share the profits, they are undoubtedly partners, and each is liable *in solido* for the loss or injury of goods which he undertakes to carry, in whatever part of the

never existed between these parties at all, or that, if it existed on the descending voyage, it ceased at its termination, and that of factor began and continued during the ascending voyage. But if the defendants bring back in the same vessel other property, the proceeds of the shipment, whether specific money or goods, they do so as carriers, and not merely as factors." So where a master of a vessel, employed in the transportation of goods between the cities of Albany and New York, received on board a quantity of flour to be carried to New York, and there sold in the usual course of such business for the ordinary freight; and the flour was sold by the master at New York for cash, and while the vessel was lying at the dock, the cabin was broken open and the money stolen out of the master's trunk while he and the crew were absent; it was held that the owners of the vessel were answerable for the money to the shippers of the flour, though no commissions, or a distinct compensation, beyond the freight, were allowed for the sale of the goods and bringing back the money, such being the duty of the master, in the usual course of the employment, where no special instructions were given. *Kemp v. Coughtry*, 11 Johns. 107. And, *per curiam*:—"Had the property which was put on board this vessel for transportation been stolen before it was converted into money, there could be no doubt the defendants would have been responsible. But the character of common-carrier does not cease upon the sale of the property. According to the testimony in this case, the sale of the goods and return of the proceeds to the

owner is a part of the duty attached to the employment, where no special instructions are given. The contract between the parties is entire, and is not fulfilled on the part of the carrier until he has complied with his orders, or has accounted with the owner for the proceeds, or brought himself within one of the excepted cases. The sale in this case was actually made, and the money received; and had it been invested in other property, to be transported from New York to Albany, there would be no question but the character of common-carrier would have continued. It can make no difference whether the return cargo is in money or goods. A person may be a common-carrier of money, as well as of other property. *Carth.* 485. Although no commission or distinct compensation was to be received upon the money, yet according to the evidence, it appears to be a part of the duty attached to the employment, and in the usual and ordinary course of the business, to bring back the money when the cargo is sold for cash. The freight of the cargo is the compensation for the whole; it is one entire concern. And the suit may be brought against the owners of the vessel. The master is considered their agent or servant, and they are responsible for the faithful discharge of his trust." See also *Taylor v. Wells*, 3 Watts, 65; *Emery v. HERSHEY*, 4 Greenl. 407.—It should be observed, however, that Mr. Justice Story has made some strictures upon the case of *Kemp v. Coughtry*, for which see *Story on Bailm.* §§ 547, 548.

(g) See *ante*, p. 656, n. (h.)

line it may have happened. (h) If the carriers be not so distinctly associated, but are so far connected that they undertake, or authorize the public to suppose that they undertake, for the whole line, they should be responsible as before. (i) But undoubtedly a carrier may receive a parcel to carry as far as he goes, and then to send it farther by another carrier. And where this is clearly the case, his responsibilities as carrier and as forwarder are entirely distinct. (j) The difficulty is in determining between these cases; and the present weight of authority seems in favor of the rule, that a carrier who knowingly receives a parcel directed or consigned to any particular place, undertakes to carry it there himself, unless he makes known a different purpose and undertaking * to the owner. (k) But this is still only a *primâ facie* pre-

(h) Thus, where A. and B. were jointly interested in the profits of a common stage-wagon, but, by a private agreement between themselves, each undertook the conducting and management of the wagon, with his own drivers and horses, for specified distances; it was *held*, notwithstanding this private agreement, that they were jointly responsible to third persons for the negligence of their drivers throughout the whole distance. *Waland v. Elkins*, 1 Stark. 272; s. c. *nom.* *Weyland v. Elkins*, Holt, N. P. 227. See also *Fromont v. Conpland*, 2 Bing. 170; *Helsby v. Mears*, 5 B. & C. 504. So where an association was formed between shippers, on Lake Ontario, and the owners of canal boats on the Erie Canal, for the transportation of goods and merchandise between the city of New York and the ports and places on Lake Ontario and the River St. Lawrence, and a contract was entered into by the agent of such association, for the transportation of goods from the city of New York to Ogdensburg, on the River St. Lawrence, and the goods were lost on Lake Ontario; it was *held*, that all the defendants were answerable for the loss, although *some* of them had no interest in the vessel navigating the lake, in which the goods were shipped. *Fairchild v. Slocum*, 19 Wend. 329, 7 Hill, 292.

(i) *Weed v. The S. & S. Railroad Co.* 19 Wend. 534.

(j) *Garside v. Trent and Mersey Na-*

vigation Co. 4 T. R. 581; *Ackley v. Kellogg*, 8 Cow. 223.

(k) The leading case upon this point is *Muschamp v. The L. & P. Junction Railway Co.*, 8 M. & W. 421. The defendants were the proprietors of the Lancaster and Preston Junction Railway, and carried on business on their line between Lancaster and Preston, as common-carriers. At Preston, the defendants' line joined that of the North Union Railway. The plaintiff, a stone mason, living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother accordingly took the box to the railway station at Lancaster, directed to the plaintiff at a place beyond Preston, in Derbyshire, and requested the clerk at the station to book it. She offered to pay the carriage in advance for the whole distance, but was told by the clerk that it had better be paid at the place of delivery. It appeared that the box arrived safely at Preston, but was lost after it was despatched from thence by the North Union Railway. The plaintiff brought this action to recover for the loss of the box. *Rolfe*, B., before whom the cause was tried, stated to the jury, in summing up, that where a common-carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking to carry the parcel to the place to which it is direct-

sumption, to be rebutted by any circumstances which will

ed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier. On a motion for a new trial, the Court of Exchequer held the instruction to be correct. Lord *Abinger* said:—"It is admitted by the defendants' counsel, that the defendants contract to do something more with the parcel than merely to carry it to Preston; they say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carriers a general power, along the whole line of route, to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now, it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion that the persons who were to carry the goods from Preston to their final destination were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not then a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? I hardly think they would be likely to infer so

elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with a name would entitle him to bring an action against them. But the question is, why should the jury infer one of these contracts rather than the other? Which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum, rather supports the inference that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage-money; a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine what the contract was, on the evidence before them. . . . In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which *primâ facie* must be made of the defendants' having undertaken to carry the goods the whole

show that the owner understood, or ought to have understood, the carrier, differently. (*l*)

way. The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; it is only *primâ facie* evidence of it; and it is useful and reasonable for the benefit of the public that it is should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward." This case is fully approved and confirmed by the late case of *Watson v. The A., N., & B. Railway Co.*, 3 E. L. & E. 497, in the Queen's Bench. That was an action for the recovery of damages sustained by the plaintiff, by reason of the non-delivery, in proper time, of plans and models sent by him from Grantham to Cardiff. The defendants' railway extended only as far as Nottingham, where it was joined by another railway, which was continued to Bristol. It appeared that a person of the name of Chevins had been appointed by the defendants as their station-master at Grantham, to receive and deliver parcels to be sent by the railway from that place, and that in such capacity he had received the package in question, which was directed to Cardiff; and there was some evidence to show that Chevins had told the plaintiff that the package would arrive at Cardiff in time. The station-master had said, when the package was delivered to him, that he could receive payment for it only so far as Nottingham, as he had no rates of payment beyond; and thereupon the words on the package, "paid to Bristol," were erased, and the words, "paid to Nottingham," substituted by Chevins, but this was done without the knowledge of the plaintiff, and the original direction was left on the package, which, being detained at Bristol, did not arrive at Cardiff in due time. The court held that the defendants were liable. *Patteson, J.*, said:—"The case of *Muschamp v. The Lancaster and Preston Junction Railway Co.* is directly in point; and if carriers receive a package to carry to a particu-

lar place, whether they themselves carry it all the way or not, they must be said to have the conveying of it to the end of the journey, and the other parties to whom they may hand it over are their agents. We must adhere to this principle, and the company are clearly liable, unless the facts show that their responsibility has determined. Their not having taken the amount of the carriage is immaterial, and is explained by the fact of their not knowing what that amount would be. Chevins appears to have been the agent of the defendants; he receives the parcel to carry it to Cardiff, and makes out an invoice, which the defendants have refused to produce. Now, putting these circumstances together, there is abundant evidence that they contracted to carry the package to Cardiff, and they were guilty of negligence in detaining it at Bristol." And per *Erle, J.*:—"The first question is, whether there is any evidence of the defendants having contracted; and I think the person to whom the package was delivered must be taken to be the agent of the company. Then, having received a parcel to be conveyed to Cardiff, when their line only extends to Nottingham, do they make themselves liable for its carriage beyond their own line? This question was much considered in *Muschamp v. The Lancaster and Preston Junction Railway Co.*, and I think it was there properly decided, that where goods are received at one terminus for conveyance to another, the company are answerable for all the intermediate *termini*, and the receipt of such goods is *primâ facie* evidence of such liability." The same doctrine was declared by the Supreme Court of New York, in the case of *St. John v. Van Santvoord*, 25 Wend. 660. But their judgment in that case was reversed by the Court for the Correction of Errors. See 6 Hill, 157. The English rule is said also to have been adopted in *Bennett v. Filyaw*, 1 Florida, 403. See Ang. Com. Car. 100. A somewhat similar question arose in the late case of *Wilcox v. Parmelee*, 3 Sandf. 610. There the plaintiff purchased in the

(*l*) See *Fowles v. Great Western Railway Co.*, 16 E. L. & E. 531, and preceding note.

How far the carrier can lessen his responsibility by his own acts, and especially by notices defining or entirely with-

city of New York a quantity of merchandise, which the defendant undertook to forward from thence to Fairport, Ohio, by a written agreement, for fifty cents by vessel, and sixty-five cents per 100 lbs. by steam. Those goods marked "steam," to go by steam, all other goods "to be shipped by vessel from Buffalo." Certain goods were marked to go by steam, but they were sent forward from Buffalo in a sailing vessel, and were lost in a gale on Lake Erie. It appeared that the defendant owned a line of boats on the canal between Albany and Buffalo, but that he had no vessels on Lake Erie. *Held*, that the defendant, by the terms of his contract, was a common-carrier, from New York to Fairport, and not merely on the canal; and that he was liable for the loss.—The English rule is condemned in very strong terms by Mr. Justice *Redfield*, in the case of *Farmers' and Mechanics' Bank v. Champlain Transportation Co.* 23 Verm. 186, 209. In speaking of the obligation of the carrier to make a personal delivery, the learned judge says:—"There has been an attempt to push one department of the law of carriers into an absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make a personal delivery. That is, by holding the first carrier, upon a route consisting of a succession of carriers, liable for the safe delivery of all articles at their ultimate destination. *Muschamp v. The L. & P. Railway Co.* 8 M. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is, by the court, put upon the ground of the particular contract in the case; and also, that 'All convenience is' in favor of such a rule, 'and there is no authority against it,' as said by Baron Rolfe, in giving judgment. *St. John v. Van Santvoord*, 25 Wend. 660, assumed similar ground. But this court, in this same case, (16 Verm. 52,) did not consider that decision as sound law, or good sense; and it has since been reversed in the Court of Errors, *Van Santvoord v. St. John*, 6 Hill, 158, and this last decision is expressly recognized by this court, 18 Verm. 131. *Weed v. Schenect. & Sar. Railroad Co.* 19

Wend. 534, is considered, by many, as having adopted the same view of the subject. But that case is readily reconciled with the general rule upon this subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case there was a kind of partnership connection between the first company and the other companies, constituting the entire route, and also that the first carriers took pay and gave a ticket through, which is most relied upon by the court. But see opinion of *Walworth, Ch.*, in *Van Santvoord v. St. John*, 6 Hill, 158. And in such cases, where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route. The case of *Bennett v. Filyaw*, 1 Florida, 403, is referred to in *Angell on Carriers*, § 95, note 1, as favoring this view of the subject. The rule laid down in *Garside v. Trent and Mersey Nav. Co.* 4 T. R. 581, that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject. *Ackley v. Kellogg*, 8 Cow. 223. This is the case of goods carried by water from New York to Troy, to be put on board a canal boat at that place, and forwarded to the north, and the goods were lost, by the upsetting of the canal boat, and the defendants were held not liable for the loss beyond their own route. The cases all seem to regard this as the general rule upon this subject, with the exception of those above referred to; one of which (8 M. & W. 421) considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking; one (25 Wend. 660) has been disregarded by this court, and reversed by their own Court of Errors, (6 Hill, 158); one (19 Wend. 534) is the case of ticketing through, upon connected lines; and one (1 Florida, 403) I have not seen." See also on this subject, *Fowles v. Great Western Railway Co.* 16 E. L. & E. 531; *Scotthorn v. South Staffordshire Rail-*

drawing his liability, has been much disputed. As much the greater part of the cases in which this question occurs, or is likely to occur, is in relation to the property of passengers, we will consider this question under our next topic, namely,

SECTION XIII.

COMMON-CARRIERS OF PASSENGERS.

The carrier of passengers is not liable for them in the same way in which the carrier of goods is liable. The rule, the exception, the limitation of the exception and reason of it, are now all perfectly well settled. By the general rule, the liability of the common-carrier does not depend upon his negligence, because he insures the owners of all the goods he carries against all loss or injury that does not come from the act of God or the public enemy. The exception to this, in the case of the carrier of passengers, is, that he is liable only where the injury has arisen from his own negligence; and the limitation to this exception is, that he is thus liable for injuries resulting from the slightest negligence on his part. (*m*)

way Co. 18 E. L. & E. 553; *Wilson v. York, Newcastle & Berwick Railway Co.* Ibid. 557; *Walker v. York & North Midland Railway Co.* 22 E. L. & E. 315; *Hellaby v. Weaver*, 17 Law Times Reps. In the case of *Hood v. New York & New Haven Railroad Co.*, 22 Conn. 1, s. c. 22 Conn. 502, it was held that the corporate power of a railroad did not extend to a contract for the carriage of a person by staging beyond their own length of road, and that the fact that they had been for a long time in the habit of making and executing such contracts, could not estop them from setting up this lack of power when sued by a person to whom they had given a ticket for conveyance beyond their line of route, and who was injured on such passage.

(*m*) *Derwort v. Loomer*, 21 Conn. 246; *Fuller v. Naugatuck Railroad Co.* Ib. 558; *Caldwell v. Murphy*, 1 Duer, 233; *Hegeman v. Western Railroad Corp.* 16 Barb. 353. This was very authoritatively declared by Lord Chief

Justice *Eyre* in the case of *Aston v. Heaven*, 2 Esp. 533. That was an action against the defendants, as proprietors of a stage-coach, to recover damages received by the plaintiff in consequence of the upsetting of the defendants' coach. The defence relied upon was, that the coach was driving at a regular pace on the Hammersmith road, but that on the side was a pump of considerable height, from whence the water was falling into a tub below; that the sun shone brightly, and being reflected strongly from the water, the horses had taken fright and run against the bank at the opposite side, where the coach was overset. And per *Eyre*, C. J.:—"This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that wherever a case happens, even where there has been no negligence, he would take the opinion of the court whether defendants circumstanced as the present, that is, coach owners, should not be liable in all cases, except where the injury happens from

Whether he is thus liable to a passenger to whom he has

the act of God or the king's enemies. I am of opinion the cases of the loss of goods by carriers and the present, are totally unlike. When that case does occur, he will be told that carriers of goods are liable by the custom, to guard against frauds they might be tempted to commit by taking goods intrusted to them to carry, and then pretending they had lost or been robbed of them: and because they can protect themselves; but there is no such rule in the case of the carriage of the persons. This action stands on the ground of negligence only." To the same effect is the ruling of Sir James Mansfield in *Christie v. Griggs*, 2 Camp. 79. That was an action of assumpsit against the defendant as owner of the Blackwall stage, on which the plaintiff, a pilot, was travelling to London, when it broke down and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second to the insufficiency of the axletree of the carriage. The defendant introduced evidence to show that the axletree had been examined a few days before it broke, without any flaw being discovered in it; and that when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace. And, per Mansfield, C. J., in summing up to the jury:—"As the driver has been cleared of every thing like negligence, the question for the jury will be as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant is not liable. There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of the passengers. His undertaking, as to them goes no farther than this, that as far as human care and foresight can go he will provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff has no remedy for the misfortune he has encountered." See also *Harris v. Cogstar*, 1 C. & P. 636; *White v. Boulton*, Peake's Cas. 81; *Crofts v. Waterhouse*, 3 Bing. 319. Such also has been repeatedly declared to be the law in this country. Thus, in the case

of *Derwort v. Loomer*, 21 Conn. 245, one of the latest cases on this subject, *Ellsworth, J.*, says:—"The rule of law on this subject is fully established in our own courts and elsewhere, and is not controverted by the learned counsel, in this case. The principle is that in the case of common carriers of passengers, the highest degree of care which a reasonable man would use, is required. This rule applies alike to the character of the vehicle, the horses and harness, the skill and sobriety of the driver, and to the manner of conducting the stage under every emergency or difficulty. The driver must, of course, be attentive and watchful. He has, for the time being, committed to his trust, the safety and lives of people, old and young, women and children, locked up as it were in the coach or rail-car, ignorant, helpless, and having no eyes, or ears, or power to guard against dangers, and who look to him for safety in their transportation. The contract to carry passengers differs, it is true, from a contract to carry freight; but in both cases the rule is rigorous and imperative; in the latter the carrier is answerable at all events except for the act of God and the public enemy; while in the former the most perfect care of prudent and cautious men is demanded and required. The stage-owner does not warrant the safety of passengers; yet his undertaking and liability as to them go to this extent, that he or his agent shall possess competent skill, and that as far as human foresight and care can reasonably go, he will transport them safely. He is not liable for injuries happening to passengers, from sheer accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his driver." See also *Fuller v. The Naugatuck Railroad Co.*, 21 Conn. 557; *Hall v. Conn. River Steamboat Co.*, 13 Conn. 319; *McKinney v. Neil*, 1 McLean, 540; *Maury v. Talmadge*, 2 McLean, 157; *Stokes v. Saltonstall*, 13 Pet. 181; *Stockton v. Frey*, 4 Gill, 406; *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 626; *Holister v. Nowlen*, 19 Wend. 236.—In the case of *Boyce v. Anderson*, 2 Pet. 150,

given passage, and from whom he has therefore no right to de-

the question arose whether the rule applicable to the carriage of goods or that applicable to the carriage of passengers should be applied to the case of negro slaves. That was an action brought by the owner of slaves, against the proprietor of a steamboat, on the Mississippi, to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the captain and commandant of the boat. The case came up on error from the Circuit Court for the District of Kentucky. The court below instructed the jury, among other things, "that the doctrine of common-carriers did not apply to the case of carrying intelligent beings, such as negroes;" and the Supreme Court held this instruction to be correct. *Marshall, C. J.*, said, "There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, 'that the doctrine of common-carriers does not apply to the case of carrying intelligent beings such as negroes.' That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property? A slave has volition and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of

common goods. There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible further. The law applicable to common-carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried farther, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them." The learned judge, in a subsequent part of his opinion, intimated that the carrier of passengers was bound only to ordinary diligence; but whatever he said to that effect cannot be considered as law, and was virtually overruled in the subsequent case of *Stokes v. Saltonstall*, 13 Pet. 181, 192. See also, as to the liability of a carrier of slaves, *Clark v. McDonald*, 4 McCord, 223; *Williams v. Taylor*, 4 Porter, 234. — If any portion of a carrier's route is attended with peculiar danger, he is bound to give his passengers notice thereof. Thus, in *Laing v. Colder*, 8 Barr, 479, which was an action on the case for negligence, whereby the plaintiff's arm was broken whilst he was travelling in the railroad car of the defendants, it appeared that the accident occurred whilst the car was passing over a bridge, which was so narrow that the plaintiff's hand, lying outside of the car-window, was caught by the bridge and his arm broken. The defendants gave evidence to show that during the journey warning had been given by their agent to a passenger named Long, of the danger of putting his feet or arms out of the window, and that he sat so near the plaintiff that the warnings must have been heard by the latter. They also proved that printed notices were put up in the cars warning passengers not to put their arms or heads outside the

mand fare, is not so certain; but he would certainly be liable for

windows, and that, immediately before reaching the bridge, notice was given in a loud voice for the passengers to keep their heads and arms inside the car. Upon this evidence *Eldred*, P. J., instructed the jury, "that a carrier of passengers was bound to furnish suitable conveyances, such as with due care and proper attention would carry passengers safely, unless interrupted by some accident which no human wisdom could foresee. That he must give notice of approaching danger, or of the dangerous places on the route, if some are more dangerous than others. This notice must be full and complete to all persons who travel, whether learned or unlearned. The slightest negligence in any of these particulars makes him liable for all damages. That in the present case, the presumption was there had been negligence, and it was for defendants to show they had done every thing in their power to relieve themselves, or that it resulted from the plaintiff's negligence and folly. That a printed notice of the danger of passengers putting their hands out of the windows was not sufficient; but if they had given plaintiff sufficient warning as they approached the bridge, this would discharge them." The case was carried up to the Supreme Court of Pennsylvania, and that court held the instruction to be correct. *Bell*, J., in delivering the judgment said:—"It is long since settled, that the common-law responsibilities that attach to carriers of goods for hire, do not, as a whole, extend to passenger carriers. Like the former, the latter are not insurers against all such accidents and injuries as are not occasioned by the act of God or the public enemy. But though in legal contemplation they do not warrant the absolute safety of their passengers, they are yet bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable to answer in damages. Nay; the mere happening of an injurious accident, raises *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist. This punctilious attention to the safety of the passenger embraces the duty of providing strong and sufficient car-

riages, or other conveyances for the journey, in every respect, sea, road, and river-worthy, safe and steady horses, or other means of progression; and skilful drivers, conductors and other agents, whose duty it is to use every precaution against danger. Should there be the least failure in any of these things, the proprietors have failed of the discharge of their legal obligations. Above all, if there be in any part of the road a particular passage more than ordinarily dangerous, or requiring superior circumspection on the part of the passenger, the conductor of the vehicle is bound to give due notice of it, and a failure to do so will make his principal responsible. Were these principles sufficiently indicated to the jury by the charge of the court? It is impossible to read it and not perceive the sedulous anxiety with which the court repeatedly pressed on the jury the extreme care and watchfulness the law exacts at the hands of a carrier of persons. The instruction upon this head was not only emphatically given, but repeated so that men of ordinary intelligence could not fail to be impressed with it." See also *Dudley v. Smith*, 1 Camp. 167; *Derwort v. Loomer*, 21 Conn. 245; *Maury v. Talmadge*, 2 McLean, 157.—So, if through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages although the coach was not actually overturned. *Jones v. Boyce*, 1 Stark. 493. This case was much considered in *Stokes v. Saltonstall*, 13 Pet. 181, and the doctrine it contains fully confirmed. See also to the same effect, *Ingalls v. Bills*, 9 Met. 1; *Eldridge v. Long Island R. Co.*, 1 Sandf. 87.—As to what will constitute that degree of negligence for which a carrier of passengers will be held liable, it must of course depend upon the circumstances of each case; and is principally a question of fact for the jury, with proper instructions from the court. See *Derwort v. Loomer*, 21 Conn. 245. In *Crofts v. Waterhouse*, 3 Bing. 319, the driver of a stage-coach gathered a bank, and upset the coach. He had passed the spot where the accident happened twelve

gross negligence, and probably liable for any negligence. (*mm*)

hours before, but in the interval a landmark had been removed. In an action for an injury sustained by this accident, *Littledale, J.*, before whom the cause was tried, told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and that the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict. A verdict having been returned accordingly, the Court of Common Pleas granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence. And per *Best, C. J.*:—"The coachman was bound to keep in the road if he could; and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the plaintiff. But the learned judge, instead of leaving it to the jury to find whether there was any negligence, told them that the coachman having gone out of the road, the plaintiff was entitled to a verdict. This action cannot be maintained unless negligence be proved; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted."

(*mm*) This question arose in the late case of the Philadelphia & Reading Railroad Co. v. Derby, 14 How. 468, in the Supreme Court of the United States, but was not decided. The court, however, strongly intimated an opinion in the affirmative. The circumstances of the case were these. The action was brought to recover damages for an injury suffered by the plaintiff on the railroad of the defendants. The plaintiff was himself the president of another railroad company, and a stockholder in the defendants'. He was on the road of the defendants by invitation of the president of the company, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the company, and paid no fare for his transportation. The injury to his person was occasioned by coming into collision with a locomotive and tender, in the charge of an agent or servant of the company, which was on the same track, and moving in an opposite direction. Another agent of the company, in the exercise of pro-

per care and caution, had given orders to keep this tract clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision. The court below instructed the jury, that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injuries to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by the defendants' counsel, as forming a defence to the action; namely, that the plaintiff was a stockholder in the company, riding by the invitation of the president, paying no fare, and not in the usual passenger cars, &c. The Supreme Court held this instruction to be correct, and *Grier, J.*, in speaking of the grounds of a carrier's duty, said:—"This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it.' See *Coggs v. Bernard*, and cases cited in 1 *Smith's Leading Cases*, 95. It is true a distinction has been taken in some cases between simple negligence and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference, (if it be capable of definition,) as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.' But see *Boyce v. Anderson*, 2 *Pet.* 150, 156, where it is said that the carrier of a slave without reward would be liable only for gross negligence. See also *Williams v. Tay-*

The reason of the difference between his liability as to passengers, and as to goods, is this. The carrier of goods has absolute control over them while they are in his hands; he can fasten them with ropes, or box them up, or put them under lock and key. But the carrier of passengers must leave to them some power of self direction, some freedom of motion, some care of themselves. It would be wrong, therefore, to hold him to as absolute a responsibility as in the case of goods. But still the policy of law applies to the carrier of passengers as to the carriers of goods. It admits only so much mitigation of the rule, as that he is liable only when he is guilty of negligence; but if in the least degree negligent, he is liable, because the law holds him to do all that care and skill can do for the safety of his passengers. Only when all this is done, and he can show that the injury complained of is not to be attributed to any default whatever on his part, or on the part of any one for whom he is responsible, is he discharged from his liability. The *onus*, to prove that he is not in fault, rests on him. (*n*)

lor, 4 Porter, 234. In *Fay v. Steamer New World*, 1 Calaf. 348, it was decided that a common-carrier transporting gold dust gratuitously was not liable in case of a loss, unless negligent.

(*n*) *Christie v. Griggs*, 2 Camp. 79. This was an action of assumpsit against the defendant as owner of the Black-wall stage, on which the plaintiff, a pilot, was travelling to London, when it broke down and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the axletree of the carriage. The plaintiff having proved that the axletree snapped asunder at a place where there was a slight descent, from the kennel crossing the road; that he was in consequence precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed, there rested his case. *Best*, Sergeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskilful, or of the coach being insufficient. But per *Mansfield*, C. J.:—"I think the plaintiff has made a *prima facie* case by proving his going on the coach,

the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded, and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident." The same point was ruled by Lord Denman at *Nisi Prius*, in *Carpue v. The L. & B. Railway Co.*, 5 Q. B. 747; it was decided by the Court of Exchequer in *Skinner v. London, Brighton and South-coast Railway Co.* 2 E. L. & E. 360, and has been repeatedly confirmed in this country. Thus, in *Ware v.*

It is his duty to receive all passengers who offer; (o) to

Gay, 11 Pick. 106, it was *held*, that if in an action by a passenger against the proprietors of a stage-coach, for an injury occasioned by the insufficiency of the coach, the plaintiff proves that while the coach was driven at a moderate rate upon a plain and level road, without coming in contact with any other object, one of the wheels came off and the coach overset, whereby the plaintiff was hurt, the law will imply negligence, and the burden of proof will rest upon the defendants to rebut this legal inference, by showing that the coach was properly fitted out and provided. To the same effect are *Stokes v. Saltonstall*, 13 Pet. 181; *Stockton v. Frey*, 4 Gill, 406; *McKenney v. Neil*, 1 McLean, 540.

(o) *Bennett v. Dutton*, 10 N.H. 481; *Jencks v. Coleman*, 2 Sumn. 221. This question was much discussed in *Bennett v. The P. & O. Steamboat Co.*, 6 C.B. 775, but the case went off finally on a question of pleading.—This obligation of the passenger carrier is, however, subject to some limitation. Thus, he may rightfully exclude all persons of bad character or habits; all whose objects are to interfere in any way with his interests, or to disturb his line of patronage; and all who refuse to obey the reasonable regulations which are made for the government of the line; and he may rightfully inquire into the habits or motives of passengers who offer themselves. *Jencks v. Coleman*, 2 Sumn. 221. This was an action against the proprietor of a steamboat, running from New York to Providence, for refusing to receive the plaintiff on board as a passenger. The plaintiff was the known agent of the Tremont line of stage-coaches. The proprietors of the steamboats President and Benjamin Franklin had, as the plaintiff knew, entered into a contract with another line called the Citizens' Stage-coach Company, to carry passengers between Boston and Providence, in connection with the boats. The plaintiff had been in the habit of coming on board the steamboats at Providence and Newport, for the purpose of soliciting passengers for the Tremont line, which the proprietors of the President and Benjamin Franklin had prohibited. It was *held* that if the jury should be of opinion that the above contract was reasonable

and *bonâ fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation in order to carry this contract into effect, the proprietors of the steamboat would be justified in refusing to take the plaintiff on board. *Story, J.*, said:—"The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board, or whose characters are doubtful, or dissolute, or suspicious; and *a fortiori* whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object is to interfere with the interests or patronage of the proprietors so as to make the business less lucrative to them." So in *Commonwealth v. Power*, 7 Met. 596, it was held that if an innkeeper, who has frequently entered a railroad depot and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars with a *bonâ fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery. But in *Bennett v. Dutton*, 10 N.H. 481, it was *held* that the proprietors of a stage-

carry them the whole route; (*p*) to demand no more than the usual and established compensation; to treat all his passengers alike; to behave to all with civility and propriety; (*q*)

coach, who hold themselves out as common-carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal; and that it was not a lawful excuse, that they ran their coach in connection with another coach, which extended the line to a certain place, and had agreed with the proprietor of such other coach not to receive passengers who came from that place, on certain days, unless they came in his coach. The defendant was one of the proprietors and the driver of a stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach, running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst and onward to Francestown. A third person ran a coach to and from Nashua and Lowell, and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement, but notwithstanding came from Lowell to Nashua in that coach, and then demanded a passage in the defendants' coach to Amherst, tendering the regular fare. Held, that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business.

(*p*) *Dudley v. Smith*, 1 Camp. 167. In this case the plaintiff took a seat on the outside of the defendants' coach to be conveyed from a place called the Red Lion, in the Strand, to Chelsea. It appeared that she was so conveyed safely as far as the Cross Keys Inn, at Chelsea, where the coach was accustomed to stop. When the coach arrived before the gateway of this inn, leading to the stable-yard, the coachman requested the plaintiff to alight there, as the passage into the yard was *very awkward*. She said, as the road was dirty, she would rather be driven into

the yard. He then advised her to stoop, and drove on. The consequence was, that she was struck violently on the shoulders and back by a low archway in the passage, by which she was severely injured. It appeared in evidence that the archway was only twelve inches higher than the top of the coach. Upon this evidence, Lord *Ellenborough*, in summing up to the jury, said:—"The defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down. As coach-owner, therefore, he was answerable for the negligent acts of his servant, till the plaintiff was set down at the usual place for passengers alighting at Chelsea. This appears, for the inside passengers at least, to have been the yard. If the coachman had said to her, 'the others will be safe in proceeding, but you must go down here, as you cannot remain upon the coach without danger to your life,' she could only have blamed her own imprudence for what followed. But he should have given her the materials to judge, if he was to leave her to make her election. He told her the passage was *awkward*; whereas, according to the evidence it was impracticable." See also *Massiter v. Cooper*, 4 Esp. 260. In *Coppin v. Braithwaite*, 8 Jur. 875, it is said to have been ruled by *Rolfe, B.*, at *Nisi Prius*, that a carrier having received a pickpocket, as a passenger, on board his vessel and taken his fare, he cannot put him on shore at an intermediate place, so long as he is not guilty of any impropriety. But see preceding note.—In *Ker v. Mountain*, 1 Esp. 27, it was ruled by Lord *Kenyon*, that if a person engages a seat in a stage-coach, and pays at the same time only a deposit, as half the fare for example, and is not at the inn ready to take his seat when the coach is setting off, the proprietor of the coach is at liberty to fill up his place with another passenger; but if, at the time of engaging his seat, he pays the whole of the fare, in such case the proprietor cannot dispose of his place, but he may take it at any stage of the journey that he thinks fit.

(*q*) *Chamberlain v. Chandler*, 3 Mason, 242.

to provide suitable carriages and means of transport; (r) to

(r) *Christie v. Griggs*, 2 Camp. 79; *Curtis v. Drinkwater*, 2 B. & Ad. 169; *Bremner v. Williams*, 1 C. & P. 414; *Israel v. Clark*, 4 Esp. 259; *Crofts v. Waterhouse*, 3 Bing. 319; *Sharp v. Grey*, 9 Bing. 457. An opinion seems to be intimated in several of the cases that the carrier is bound to warrant the sufficiency of his coach. Thus in *Israel v. Clark*, 4 Esp. 259, Lord *Ellenborough* is reported to have said that carriers were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them; and that at all events he should expect a clear *landworthiness* in the carriage to be established. So in *Bremner v. Williams*, 1 C. & P. 414, *Best, C.J.*, says he considers that every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. And finally in *Sharp v. Grey*, 9 Bing. 457, *Bosanquet, J.*, says that if a coach, when it starts upon its journey, is not *roadworthy*, the proprietor is liable for the consequences upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy. And in *Benett v. The P. & O. Steamboat Co.*, 6 C. B. 775, 782, upon *Sharp v. Grey* being cited by Sir John *Jervis*, attorney-general, who said it decided, in substance, that a coach-proprietor is bound to use all ordinary care and diligence to provide a safe vehicle, *Cresswell, J.*, interrupting him, said:—"It goes a little further than that; it lays down that he is bound at all events to provide a sound coach." But the contrary doctrine was ruled in *Christie v. Griggs*, 2 Camp. 79, by Sir James *Mansfield*, who held that only the same measure of diligence was required of a passenger carrier in the construction and care of his coach, as in all other matters appertaining to the conveyance of his passengers. See the case stated with the learned judge's opinion, *ante*, p. 691, n. (m). And the doctrine of this case was clearly established as the law in this country by the case of *Ingalls v. Bills*, 9 Met. 1. That was an action to recover damages for an injury received by the plaintiff from a defect in the defendants' coach. The defendants introduced evidence tending to prove that they had taken all possible care, and incurred extraordinary expense, in order that the coach should be of the best materials and

workmanship; that at the time of the accident, the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound, and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and roadworthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axletree, at the place where it was broken, about three eighths of an inch in length, and wide enough to insert the point of a fine needle or pin; which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the breaking; that the said defect was entirely surrounded by sound iron one quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally. The learned judge, before whom the cause was tried, instructed the jury that the defendants were bound by law, and an implied promise on their part, to provide a coach, not only apparently, but really, roadworthy; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination. The defendant excepted and moved for a new trial, which was granted. *Hubbard, J.*, after a very thorough and able examination of the cases, concluded his opinion thus:—"The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hid-

maintain a reasonable degree of speed; (s) and to have servants and agents competent to their several employments, and for the default of his servants or agents, in any of the above particulars, or generally, in any other points of duty, the carrier is directly responsible. (t) And he is liable for

den and internal defect, which a careful and thorough examination would not disclose and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." Such also would seem, from the late case of *Grote v. The C. & H. Railway Co.*, 2 Exch. 251, to be the doctrine now held in England. That was an action against a railway company to recover compensation for an injury received by the plaintiff by the breaking down of a bridge, over which he was passing in a passenger train. It appeared at the trial that the services of an eminent engineer had been engaged in the construction of the work. *Williams, J.*, before whom the cause was tried, told the jury that the question was, whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purposes for which it was made; and that, if they should think not, and that the accident was attributable to any such deficiency, the plaintiff would be entitled to recover. The counsel for the defendants objected, that the defendants would not be liable unless they had been guilty of negligence either in constructing or maintaining the bridge. His lordship, however, left the question to the jury, subject to his previous direction. Upon an application to the court of Exchequer for a new trial, *Pollock, C. B.*, said:—"It does not at present distinctly appear whether or not the attention of the jury was directed to the proposition that if a party in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted and the best materials are used, such party is not liable for the accident. If the jury have been directed in conformity with

this rule, there is no ground for the present application. It cannot be contended that the defendants are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge. Upon this point we will consult our learned brother." On a subsequent day the Chief Baron said that they had consulted the learned judge, who reported to them that he had directed the jury in conformity with the above proposition, and that therefore there would be no rule. This case, however, shows that it would not be sufficient to exempt a coach-proprietor from liability, that he had employed a skilful workman to construct his coach; it must appear that it was actually constructed with all possible care and skill.—So a passenger carrier will be held to the greatest vigilance in examining and inspecting his vehicles from time to time. Thus, in *Bremner v. Williams*, 1 C. & P. 414, it was ruled by *Best, C. J.*, that a coach-proprietor ought to examine the sufficiency of his coach previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach-proprietor for negligence, though the coach had been examined previous to the second journey before the accident; and though it had been repaired at the coach-maker's only three or four days before.

(s) See *Mayor v. Humphries*, 1 C. & P. 251; *Carpue v. The L. & B. Railway Co.*, 5 Q. B. 747. See also the charge of *Best, C. J.*, to the grand jury, 8 C. & P. 694, n. (b).

(t) The owner is liable for an accident which happens from the driver's intoxication; but not if from his physical disability, arising without his fault from extreme and unusual cold which rendered him incapable for the time of doing his duty. *Stokes v. Saltonstall*, 13 Peters, 181. See also *McKinney v. Neil*, 1 McLean, 550; *Peck v. Neil*, 3 McLean, 24. The rule stated in the text

the acts of partners, or *quasi* partners, in the same manner that the carrier of goods is liable. (*u*)

The carrier, whether of goods or passengers, is liable for an injury to strangers, if this be caused by the negligence of the driver or conductor; (*v*) as if he runs over one, or otherwise injures him, while he is walking on a public way. (*w*) And where such an injury results in death, if an action is given by statute to the personal representatives of the deceased the damages therein must be wholly confined to pecuniary injuries, and will not extend to mental suffering occasioned to the survivors. (*ww*) Nor is it a defence for the carrier that the road was out of order, nor that the reins or harness broke, for he should have had better ones. (*x*) But if the person injured in some degree caused the injury by his own negli-

received a very strong application in the late case of *McElroy et ux. v. Nashua & Lowell R. R. Corp.* 4 Cush. 400. It was an action on the case to recover damages of the defendants for an injury alleged to have been sustained by the female plaintiff, while riding as a passenger in the defendants' cars from Lowell to Nashville. The alleged injury happened in consequence of the careless management of a switch, by which the Concord Railroad connected with and entered upon the defendants' road. The switch was provided by the proprietors of the Concord Railroad, and attended by one of their servants, at their expense. It was *held* that the defendants were liable. And Shaw, C. J., said:—"The court are of opinion upon the facts agreed that the defendants are liable to the plaintiffs for the damage sustained by the wife whilst travelling in their cars. As passenger carriers the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendants' road, over which they must

necessarily carry all their passengers, and although provided for, and attended by, a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua & Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended, and managed before they were justified in carrying passengers over it." See also *Grote v. The C. & H. Railway Co.*, 2 Exch. 251; cited *ante*, p. 699, n. (*r*).

(*u*) *Dwight v. Brewster*, 1 Pick. 50; *Champion v. Bostwick*, 11 Wend. 571, 18 *id.* 175; *Waland v. Elkins*, 1 Stark. 277; *Fromont v. Coupland*, 9 Moore, 319; *Cobb v. Abbot*, 14 Pick. 289; *Wetmore v. Baker*, 9 Johns. 307; *Green v. Beesley*, 2 Bing. N. C. 108; *Stockton v. Frey*, 4 Gill, 406.

(*v*) *Stables v. Eley*, 1 C. & P. 614; *Sleath v. Wilson*, 9 C. & P. 607; *Joel v. Morison*, 6 C. & P. 501. And if a horse and cart are left in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by, in striking the horse. *Illidge v. Goodwin*, 5 C. & P. 190. See also *Lynch v. Nurdin*, 1 Q. B. 29.

(*w*) *Boss v. Litton*, 5 C. & P. 407; *Cotterill v. Starkey*, 8 C. & P. 691; *Hawkins v. Cooper*, 8 C. & P. 473; *Wynn v. Allard*, 5 W. & S. 524.

(*ww*) *Blake, Admr. v. Midland Railway Co.* 10 E. L. & E. 437.

(*x*) *Cotterill v. Starkey*, 8 C. & P. 691; *Welsh v. Lawrence*, 2 Chit. 262.

gence, and was capable of ordinary care and caution, he cannot recover damages, unless the negligence of the party who did the injury was so extreme *as to imply malice. (y) So the carrier is liable for injury done to property by the way-side, unless he can discharge himself from want of care. (z)

In cases of injury by collision, he whose negligence causes the injury is responsible. What is called the law of the road, is in this country, little more than that each party shall keep to the right; in England to the left. At sea, a vessel going free must give way to the one on the wind; one on the larboard tack gives way to one on the starboard tack. And steamers must give way to sailing vessels. These rules, as to vessels, are based upon the simple principle, that the vessel which can alter her course most easily must do so; and they are often qualified by an application of this prin-

(y) *Woolf v. Beard*, 8 C. & P. 373; *Cotterill v. Starkey*, 8 C. & P. 591; *Wynn v. Allard*, 5 W. & S. 524; *Cook v. Champlain Transportation Co.* 1 Denio, 91; *Brownell v. Flagler*, 5 Hill, 282; *Barnes v. Cole*, 21 Wend. 188; *Rathbun v. Payne*, 19 Wend. 399; *Perkins v. Eastern and B. & M. R. R. Co.*, 29 Maine, 307; *May v. Princeton*, 11 Met. 442; *Parker v. Adams*, 12 Met. 415; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 4 Comst. 349; *Brown v. Maxwell*, 6 Hill, 592; *Trow v. Verm. Central R. R. Co.*, 6 Law Rep. N. S. 83; *N. Y. & E. Railway v. Skinner*, Supreme Court of Pennsylvania, Am. Law Register, Vol. 1, No. 2, p. 97. See also *White v. Winnissimmet Co.* 7 Cush. 160; *Willets v. Buffalo & Rochester R. R. Co.* 14 Barb. 585; *Wiloughby v. Horridge*, 16 E. L. & E. 437. But if the injury be voluntary and intentional the party committing it will be liable, notwithstanding the party injured was guilty of negligence. Therefore, where the plaintiff, being the owner of a lamb, allowed it to escape into the highway, where it mingled with a flock of sheep which the defendant was driving along; and he, knowing this fact, made no attempt to separate the lamb from the flock, but delivered the whole to a drover in pursuance of a sale previously made, by whom they were taken off to market; it was held that these facts were sufficient to

authorize a verdict in favor of the plaintiff for the value of the lamb, though it was not included in the sale to the drover, and the defendant received nothing on account of it. *Brownell v. Flagler*, 5 Hill, 282. See also *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 267, per *Beardsley, C. J.*; *Cook v. The Champlain Transportation Co.*, 1 Denio, 91; *Wynn v. Allard*, 5 W. & S. 524; *Rathbun v. Payne*, 19 Wend. 399; *Clay v. Wood*, 5 Esp. 44. So where the party injured is a child of tender years, or otherwise incapable of ordinary care and caution. *Lynch v. Nurdin*, 1 Q. B. 29. In this case the defendant left his horse and cart unattended in the street. The plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on; and the plaintiff was thereby thrown down and hurt. It was held that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the injury by his own act. This case is confirmed by *Birge v. Gardiner*, 19 Conn. 507, and *Robinson v. Conc*, 22 Verm. 213. But see *contrâ*, *Hartfield v. Roper*, 21 Wend. 615, confirmed by *Brown v. Maxwell*, 6 Hill, 592, and *Munger v. Tonawanda R. R. Co.*, 4 Comst. 349.

(z) *Davies v. Mann*, 10 M. & W. 546; *Cook v. The Champlain Transportation Co.*, 1 Denio, 91.

ciple. (a) An observance of these rules, or a disregard of them, is often very important in determining the question of negligence; especially where the parties meet very suddenly. *But the law of the road alone does not decide this question; for a violation of it may be for good cause, or under circumstances which negative the presumption of negligence which might otherwise arise from it. (b) It is said that he who suffers injury from collision, caused by the negligence of another, cannot recover damages if he was himself at all negligent, and if his negligence helped to cause the injury. In some cases this principle has been applied with great rigor, and asserted in very broad terms; but it is obvious, that, as a general rule, it must be considerably modified. It is impossible that he who seeks redress for a wrong which he has sustained by the negligence of another, should always lose all right, where he has himself been in any way negligent. There must be some comparison of the negligence of the one party with that of the other, as to its intensity, or the circumstances which excuse it, or the degree in which it enters as a cause into the production of the injury complained of. In each case it must be a question of mixed law and fact, in which the jury, under the direction of the court, will inquire whether the defendant was guilty of so great a degree of negligence as, in the particular case, will render him liable, and then, whether the plaintiff was also guilty of so much negligence as to defeat his claim. (c)

(a) *Lowry v. The Steamboat Portland*, 1 Law Reporter, (1839) p. 313; *Lockwood v. Lashell*, 5 Law Rep. N. S. 390.

(b) See *Pluckwell v. Wilson*, 5 C. & P. 375; *Kennard v. Burton*, 25 Maine, 39; *Chaplin v. Hawes*, 3 C. & P. 554; *Clay v. Wood*, 5 Esp. 44; *Wayde v. Carr*, 2 D. & R. 255; *Butterfield v. Forrester*, 11 East, 60; *Turley v. Thomas*, 8 C. & P. 103; *Wordsworth v. Willan*, 5 Esp. 273; *Mahew v. Boyce*, 1 Stark. 423; *McLean v. Sharpe*, 2 Harring. 481.

(c) See *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, Id. 243; *Thorogood v. Bryan*, 8 C. B. 115;

Kennard v. Burton, 25 Maine, 39; *Marriott v. Stanley*, 1 M. & Gr. 568; *Clayards v. Dethick*, 12 Q. B. 439; *Beatty v. Gilmore*, 16 Penn. State Rep. 463; *Trow v. Verm. Central R. R. Co.*, 6 Law Rep. N. S. 83; *Cattlin v. Hills*, 8 C. B. 123; *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *Robinson v. Cone*, 22 Verm. 213; *Moore v. Inhabitants of Abbot*, 32 Maine, 46; *Munroe v. Leach*, 7 Met. 274; *Churchill v. Rosebeck*, 15 Conn. 359; *Carroll v. N. Y. and N. H. R. R. Co.*, 6 Law Rep. N. S. 101; 1 Duer, 571; *Trow v. Verm. Central R. R. Co.* 24 Verm. 487. See also *ante*, p. 701, *note*, (y).

SECTION XIV.

OF SPECIAL AGREEMENTS AND NOTICES.

We have seen how severe a responsibility is cast upon the common-carrier by the law; and it is a very interesting question, how far he may remove it, or lessen it, with or without the concurrence of the other party. Can the carrier do this by a special contract with the owner of the goods; and if so, is a notice by the carrier brought home to the owner equivalent to such contract; and if the carrier cannot in this way relieve himself entirely from his responsibility, can he lessen and qualify it? Some of these questions are not yet definitely settled.

There is no doubt that, originally, this responsibility was considered as beyond the reach of the carrier himself. It is but about fifty years since he was permitted to qualify or control it by his own act. And courts have been influenced in their opinion of his rights in this respect, by the view they have taken of the nature of his responsibility. The more they have regarded it as created by the law for public reasons, the less willing have they been that it should be placed within the control of one or of both parties to be modified at their pleasure.

The first question is, can the peculiar responsibility of the common-carrier be destroyed by express contract between himself and one who sends goods or takes them with him, so as to reduce the carrier's liability to that of a private carrier, and make him liable only for his own default? It seems to be well settled by the weight of authority that this may be done; (*d*) although in some of the cases in which it is

(*d*) It seems now to be perfectly settled in this country and in England that a special contract between the owner of goods and a carrier, limiting the common-law liability of the latter, is valid. It is wholly unnecessary to cite authorities to show that such is the case in England; for, although, as we shall pre-

sently see, scarcely a volume of English reports appears which does not contain more or less cases concerning contracts of this description, no question is ever made as to their validity. Nor do we conceive this to be a departure from the ancient principles of the common law; for it nowhere appears that such con-

allowed, it is intimated that this is a departure from the

tracts were ever prohibited as contravening the policy of the law. "There is no case," says Lord *Ellenborough*, in *Nicholson v. Willan*, 5 East. 507, "to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." It should be observed, moreover, that this question is not at all affected by the Carriers Act, 11 G. IV. & 1 Will. IV. c. 68, for by the 6th section of that act it is provided that nothing in the act contained shall in any wise affect any special contract for the conveyance of goods and merchandises. See the Act fully stated, *post*, p. 711, n. (*h*). On this side of the Atlantic we are not aware of any case in which the validity of such contracts is denied until *Cole v. Goodwin*, 19 Wend. 251, (1838). There the defendants who were stage-coach proprietors, had published a notice to the effect that all baggage sent by their line would be at the risk of the owners. The question was, whether such notice, brought home to the knowledge of the plaintiff, should exempt the defendants from their common-law liability. And it was held that it should not. And Mr. Justice *Cowen*, who delivered the opinion, declared that there was no difference between such notice brought to the plaintiff's knowledge and an express contract; that both were evidence of an agreement between the parties to limit the carrier's liability; but that both were void as contravening the policy of the law. In 1840, the case of *Jones v. Voorhees*, 10 Ohio, 145, was decided by the Supreme Court of Ohio. That case raised precisely the same question that was raised in *Cole v. Goodwin*; and, although the decision went no farther than to declare that a notice brought to the plaintiff's knowledge did not exempt the defendant from his common-law liability, *Wood, J.*, who delivered the opinion of the court, manifested a strong inclination to adopt the views of Mr. Justice *Cowen*, in their full extent. In 1842 came the case of *Gould v. Hill*, 2 Hill, 623. That was an action brought in the Superior Court of the city of New York, against the defendants, as common-carriers, to recover the value of certain goods delivered to them to be transported from

New York to Philadelphia. On delivering the goods in question to the defendants, they gave the plaintiffs a memorandum, which stated, among other things, that the defendants would not hold themselves responsible in case of loss by fire. The goods were destroyed by fire on their passage; and evidence was given tending to show that the loss was not occasioned by the negligence or want of care of the defendants. The court charged the jury that under the circumstances the defendants were chargeable only for a loss resulting from negligence. The plaintiff excepted, and the jury having returned a verdict for the defendants, upon which judgment was rendered, a writ of error was sued out from the Supreme Court. And per *Cowen, J.*: "In this case the common-carriers, instead of alleging a general notice restricting their liability to the plaintiffs and all others, furnished them with a special acceptance in writing, which they received, and delivered the goods accordingly. This constitutes undoubted evidence of assent on their part. One exception was, of casualties occasioned by fire; and the loss arose from that cause. The servants of the defendants were called as witnesses to make out a case of care; and the jury, under the charge of the court, allowed this as a defence. For myself I shall do little more than refer to my opinion in *Cole v. Goodwin*, (19 Wend. 281,) and the reasons for such opinion as stated in the course of that case. It was to the effect, that I could no more regard a special acceptance as operating to take from the duty of the common-carrier, than a general one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the courts. The only difference lies in the different kinds of evidence by which the contract is made out. When the jury have found that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the bailor as if he had reduced it to writing. Indeed, the contrary construction would, I think, be to tolerate a fraud on the part of the

ancient principles of the common law. It has also been said

bailor. The true ground for repudiating the general notice, is, therefore, its being against public policy; and this ground goes not only to the evidence—the mode in which you are to prove the assent—but to the contract itself. After forbidding the carrier to impose it under the form of a general notice, therefore, we cannot consistently allow him to do the same thing in the form of a special notice or receipt. The consequences to the public would be the same, whether we allow one form or the other.” The judgment was accordingly reversed; *Nelson, C. J., dissenting*. We are not aware that this decision has ever been sanctioned by any court in this country. It received the approbation of Mr. Justice *Nisbet* in *Fish v. Chapman*, 2 Geo. 349, but that case did not call for any decision upon the question. On the other hand, in 1848, the Supreme Court of the United States, in the case of *The New Jersey Steam Nav. Co. v. Merchants’ Bank*, 6 How. 344, denied the authority of *Gould v. Hill*, and held such a contract to be valid. *Nelson, J.*, said:—“As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property,—the safe custody and delivery of the goods,—we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties. The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence. The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the common-law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted.” Since that time, *Gould v. Hill* has been expressly overruled in New York in three cases; one in the Supreme Court, and two in the Superior Court of the city of New York. We allude to *Parsons v. Monteath*, 13 Barb. 353, *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. 136, and *Stoddard v. The Long Island R. R. Co.*, 5 Sandf. 180. *Dorr v. N. J. Steam Nav. Co.* was an action against the defendants, as common-carriers upon the Long Island Sound, between New York and Stonington, to recover damages for the loss of goods. The declaration averred that the plaintiffs, who were merchants in New York, shipped the goods in question on board the steamer *Lexington*, in the defendants’ line, to be carried to Stonington; that on the same evening, the steamer was consumed by fire on her passage, and the plaintiffs’ goods destroyed. The defendants pleaded that the goods in question were received by them under a special contract, by reason of a clause and notice inserted in their bill of lading, which was set forth in the plea, and which contained, among other things, that the goods in question were to be transported to Stonington; *danger of fire &c., excepted*. The plea then averred that the liability of the defendants was restricted by the exception of the casualties mentioned in the bill of lading, and that the loss in question was occasioned by one of the excepted casualties, and was without the fault or negligence of the defendants. To this plea the plaintiffs demurred. And *Campbell, J.*, in pronouncing judgment upon the demurrer in favor of the defendants, said:—“The question presented for our consideration is, whether common-carriers can, by special contract, restrict their liabilities for losses which occur otherwise than by the act of God or the public enemies. If the point were now for the first time raised, we should have considered it, if not entirely free from difficulty, at least as not leaving much room for doubt as to the correctness of the conclusion at which we have arrived. The judgment of a majority of the late Supreme Court, pronounced

in some late cases in this country, particularly in one in New

in the case of *Gould v. Hill*, 2 Hill's R. 623, was cited and urged on the part of the plaintiffs as settling the law in this State, that a common-carrier cannot, by special contract, limit his liability. Though the court was divided in opinion, the cause does not seem to have been carried to the court for the correction of errors, and we are not therefore sure of what would have been the decision of the court of last resort. But the clear conviction of all of us, that the case of *Gould v. Hill* was not correctly decided, supported as we are by the Supreme Court of the United States, (*Merchant's Bank v. New Jersey Steam Navigation Company*, 6 Howard, 344,) and the great importance of the question to a commercial people, especially the importance of uniformity between the courts of the State and Union, in the rules of law regulating commercial transactions, compel us respectfully to dissent from the judgment in that case." *Stoddard v. Long Island R. R. Co.* is to the same effect. In *Parsons v. Monteath*, the defendants being common-carriers on the Erie Canal, between Albany and Buffalo, and occupying a warehouse on the pier at Albany, their agent in New York received goods there, belonging to the plaintiff, and gave a receipt or shipping-bill therefor, in the name of the defendants, by which they agreed to transport the goods to Brighton Locks, "the danger of the lakes, of fire, &c., and acts of providence excepted." The goods reached Albany on the morning of August 17, 1848, and were taken from the tow-boats into the defendants' warehouse on the pier. On the same day a fire broke out in the city of Albany, by which the warehouse was consumed; and the plaintiff's goods, being removed by the defendants' agent into a canal boat in the basin, were destroyed by the fire. *Held*, that the defendants sustained the relation of common-carriers of the goods, at the time the fire broke out, and when the goods were destroyed; and that the rules of law incident to that relation applied to them; but that they had a right to circumscribe or limit their common-law liability as common-carriers, by agreement; and that having expressly excepted the risk

of loss by fire, they were not liable for the value of the goods. *Wells, J.*, said: — "Were it not for the late case of *Gould v. Hill*, (2 Hill, 623,) I should have no hesitation in holding the contract between the parties as valid and binding, and one to which we were bound to give effect. To do so would be in accordance with a long and unbroken course of decision in England and in many of our sister States, and in all of them, I believe, where the question has arisen, excepting Ohio; and would be in harmony with the views of all the elementary writers on the subject. It is unnecessary to go into a particular examination of the authorities cited. I content myself with the remark, that the doctrine is fully asserted by Story, Chitty, Kent, and Angell, and most abundantly sustained by the authorities to which they refer. But in the case of *Gould v. Hill*, (*supra*,) Justice Cowen held a contrary doctrine; that it was not competent for a common-carrier to restrict, by special contract, his common-law liability; and that where the defendant, being a common-carrier, on receiving the plaintiff's goods for transportation, gave him a memorandum by which he promised to forward the goods to their place of destination, *danger of fire, &c.*, excepted, the defendant was liable for a loss by fire although not resulting from negligence. The learned justice puts his decision wholly on the ground of public policy; and refers to his reasoning in the case of *Cole v. Goodwin*, (19 Wend. 251,) the substance of which is (p. 281) that a common-carrier's business is of a public nature; that he is a public servant and bound to perform the duties of his office, and that he should no more be permitted to limit or vary his obligations or liabilities by contract, than a sheriff, or jailor, or any other officer appointed by law. The only question with me is, how far we are bound by the case of *Gould v. Hill*, and whether the maxim, *stare decisis*, in consequence of it, is to govern the present case. It is the only reported case where this precise question has been decided in that way in this State. No case that I am aware of, has followed it, affirming the doctrine. *Nelson*, then chief justice of this court, dissented from the decision.

York, (e) that no such contract is valid, or has any efficacy. But this case seems to rest upon a previous decision, (f) that the carrier's responsibility is not affected by a notice from him made known to the other party; and upon the difficulty of distinguishing this from an express contract.

Undoubtedly it may be difficult to discriminate very clearly between the case where the carrier and the sender expressly agree that the carrier shall not be responsible for the property, and that in which the carrier says to the sender, "If you send goods by me, I will not be responsible for them," and the sender thereafter, without reply, sends goods

I am disposed therefore to think, in view of the great importance of the question and its connection with so large a branch of the commerce of the country, that we ought to take the responsibility of overruling it, providing we think it not in accordance with the settled law of the land. It is a question in relation to which, almost above all others, the law should be uniform throughout the commercial world, especially among the different States of the Union. It relates to transactions, which, in their nature, expand themselves over and through extensive districts of country, and to places widely separated from each other. No one can fail to perceive the great inconvenience that must result from having different and hostile rules on the subject, prevailing between the different Atlantic cities, or between them and the Western States. If it be true, as I think is undeniable, that by the law as entirely settled in England, and in most of the United States, and as held by the most eminent jurists of the country, a common-carrier may, by special contract with his employer, limit his liability and relax the rigor of the common-law rule applicable to his position, I think we ought not to hesitate in giving the law, so declared, effect in the case at bar, notwithstanding the isolated authority in this court, which stands opposed to it. I think the rule as laid down by Justice *Coven*, should be regarded as a deviation from the true one, from which the court should return at the earliest opportunity, and that, too, notwithstanding we might, were the question entirely open, prefer a different one." The learned judge then proceeds to declare his disapproval

of *Gould v. Hill* upon principle, admitting the question to be still an open one, and concludes:—"In every light that I have been able to view the question, I am forced to the conclusion that the rule in *Gould v. Hill*, is not, and ought not to be, the law. That it is opposed to reason as well as to authority, and ought not to be followed." And in the late case of *Moore v. Evans*, 14 Barb. 524, *Gould v. Hill* is again explicitly overruled. See also *Stoddard v. Long Island R. R. Co.*, 5 Sandf. 180. The result is that there is no case, which is any longer to be regarded as an authority, that decides that an express contract between the owner of goods and a carrier, limiting the liability of the latter, is void. For cases, besides those already cited, which hold that such a contract is valid and binding, see the following:—*Swindler v. Hilliard*, 2 Rich. 286; *Camden and Amboy Railroad Co. v. Baldauf*, 16 Penn. State Rep. 67; *Bingham v. Rogers*, 6 W. & S. 495; *Beckman v. Shouse*, 5 Rawle, 179; *Reno v. Hogan*, 12 B. Monr. 63; *Farmers and Mechanics' Bank v. Champlain Transportation Co.*, '23 Verm. 186; *Sager v. The Portsmouth & C. R. R. Co.*, 31 Maine, 228; *Walker v. York & No. Midland Railway*, 3 Carr. & Kir. 279. See also the editors' notes to *Austin v. The M., S., & L. Railway Co.*, 11 E. L. & E. 506, and *Carr v. The L. & Y. Railway Co.*, 14 E. L. & E. 340, where the cases are collected. To what extent a carrier may thus exempt himself from his common-law liability, we shall inquire in another note.

(e) *Gould v. Hill*, 2 Hill, 623.

(f) *Cole v. Goodwin*, 19 Wend. 251.

by him. But we think there is a real difference. The rule of law, derived from public policy, may not go so far as to say that the carrier and the sender shall not agree upon the terms on which the goods are to be transported; but it may nevertheless say, that the carrier has neither the right to force such an agreement on the sender, not to infer, *merely from his silence*, that he accepts the proposed terms. He may be silent either because he assents to them, or because he disregards them, and chooses to stand upon the rights which the law secures to him. The sender, who may be a passenger about to enter a boat or a car with his baggage, learns by reading the ticket which he buys that if he puts that baggage on board it will be all the way at his own risk. He has a right to disregard such notice; to say it is not true; to deliver his baggage to the proper person, placing it under the responsibilities which lie upon the carrier by the general law. To hold otherwise would be to say, not merely that carrier and sender may agree to relieve the carrier from his peculiar liability, but that the carrier has a right to force this agreement on the sender; which is a very different thing. (g)

(g) The question whether a public notice, brought to the knowledge of the bailor, will constitute such special contract, or be equivalent thereto, is perhaps not entirely settled, but the decided weight of authority is that it will not. The first case in which it was, expressly ruled that such a notice was valid and binding, is that of *Maving v. Todd*, 1 Stark. 72, decided in 1815. For several years previous to this, as we shall presently see, carriers had been in the habit of publishing notices to the effect that they would not be responsible for goods beyond a certain value, unless their true value was disclosed, and freight paid accordingly; and these notices had received the sanction of the courts. In the case of *Ellis v. Turner*, 8 T. R. 531, decided in 1800, a notice of a different character made its appearance. It was an action against the defendants as ship-owners for the loss of goods. They had published a notice to the effect that they would not be answerable for any loss or damage that might happen to any cargo, unless

such loss or damage should be occasioned by the want of ordinary care and diligence in the master and crew, in which case they would pay £10 per cent. upon the loss or damage, provided such payment did not exceed the value of the vessel; but that they were willing to insure against all accidents, on receiving extra freight in proportion to the value. The case, however, went off upon another point, so that the validity of the notice did not come in question. In 1804 came the case of *Lyon v. Mells*, 8 East, 428, in which a notice of the same import had been given. But this case also went off without drawing in question the validity of the notice. In 1813, in the case of *Evans v. Soule*, 2 M. & S. 1, a notice appeared which extended the exemption of the carrier still farther. That also was an action against the owner of a vessel. He had given notice that he should not consider himself liable to make good to any extent any loss or damage arising from any accident or misfortune whatever, unless occasioned

But although the common-carrier cannot by such notice extinguish his peculiar liability, yet he can in this way mate-

by the actual negligence of the master or mariners. The plaintiff's counsel did not deny the validity of the notice, but contended that it had been waived. The court merely decided that it had not been waived, and gave judgment for the defendant. Thus stood the cases when *Maving v. Todd* came up, in 1815. This was an action against the defendants, who were lightermen, for the loss of goods intrusted to them, to carry. It appeared that the goods, whilst in the defendants' custody, had been accidentally destroyed by fire, and the question was, whether they were liable for the loss. It appeared that they had so limited their responsibility by a notice that it did not extend to a loss by fire. *Holroyd*, for the plaintiff, submitted "whether the defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers, who had only limited their responsibility to a certain amount." But, per Lord *Ellenborough*:—"Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say, we will have nothing to do with fire." *Holroyd*. "They were bound to receive the goods." Lord *Ellenborough*. "Yes, but they may make their own terms. I am sorry the law is so; it leads to very great negligence." The next year came the case of *Leeson v. Holt*, 1 Stark. 186. The plaintiff in this case had sent some chairs by the defendant, who was a common-carrier. The defendant had given a notice to the effect that all household furniture sent by him would be entirely at the risk of the owner as to damage, breakage, &c. Lord *Ellenborough*, in summing up to the jury, said:—"If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two; where the loss is occasioned by the act of God, or of the king's enemies using an overwhelming force, which persons with ordinary means of resistance cannot guard against. It was found, that the common law imposed upon carriers a liability of ruinous extent, and in consequence, qualifications and limitations of that liability have been introduced from

time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice, if a servant of the carrier's had in the most wilful and wanton manner destroyed the furniture intrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted, if he chooses to send his goods to be carried after notice of the conditions. The question then is, whether there was a special contract. If the carriers notified their terms to the person bringing the goods, by an advertisement, which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract." This is the last that we hear of notices of this character in England, until they were finally put an end to by the Carriers Act, already alluded to. See the Act, *post*, p. 711, n. (h). On this side of the Atlantic these notices were extensively discussed for the first time in *Hollister v. Nowlen*, 19 Wend. 234, and *Cole v. Goodwin*, Id. 251. These cases were decided in 1838. The defendants in both cases were coach proprietors, and had published notices to the effect that all baggage sent by their lines would be at the risk of the owners. The Supreme Court of New York, after a most careful consideration of the question, declared that the notices were of no avail; that the defendants were, notwithstanding, subject to all their common-law liability. Mr. Justice *Coven*, who delivered the opinion in the last case, placed the judgment of the court, as we have already seen, on grounds of public policy, which extended equally to such notices and to special contracts. But in the former case the opinion was delivered by Mr. Justice *Bronson*, and he took the ground that such notices were not, upon sound principles of construction, equivalent to a special contract. Upon this point he uses the following language:—"Conceding that there may be a special contract for a restricted liability, such a

rially modify and qualify it. A public notice, so spread abroad that all might know it, and brought to the distinct knowledge of the sender, would undoubtedly justify the carrier who pro-

contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic, after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods, after seeing a notice, cannot warrant a stronger presumption that the owner intended to assent to a restricted liability, on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities." To the same effect are the remarks of *Redfield, J.*, in *Farmers' and Mechanics' Bank v. The Champlain Transportation Co.*, 23 Verm. 186, 205. "We are more inclined," says he, "to adopt the view which the American cases have taken of this subject of notices, by common-carriers, intended to

qualify their responsibility, than that of the English courts, which they have in some instances subsequently regretted. The consideration that carriers are bound, at all events, to carry such parcels, within the general scope of their business, as are offered to them to carry, will make an essential difference between the effect of notices by them, and by others who have an option in regard to work which they undertake. In the former case, the contractor having no right to exact unreasonable terms, his giving public notice that he shall do so, where those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands as arises in those cases where the contractor has the absolute right to impose his own conditions. And unless it be made clearly to appear, that persons contracting with common-carriers expressly consent to be bound by the terms of such notices, it does not appear to us that such acquiescence ought to be inferred." The same doctrine is held in *Crouch v. North-Western Railway Co.*, 19 Law Times Rep. 90; *Clark v. Faxon*, 21 Wend. 153; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. 136; *Parsons v. Monteath*, 13 Barb. 353; *Stoddard v. The Long Island Railway Co.*, 5 Sandf. 180; *Fish v. Chapman*, 2 Geo. 349; *Moses v. Boston & Maine R. R.*, 4 Foster, 71. See *ante*, n. (d). Some of our courts, however, even since *Hollister v. Nowlen and Cole v. Goodwin* were decided, have held similar notices valid. But they have generally done so with reluctance, and upon the ground that they considered themselves bound by the decisions of their predecessors. See *C. & A. Railroad Co. v. Baldauf*, 16 Penn. State Rep. 67; *Laing v. Colder*, 8 Barr, 479; *Bingham v. Rogers*, 6 W. & S. 500. See also *Sager v. The Portsmouth, &c. Railroad Co.*, 31 Maine, 228. We think there cannot be much doubt but that the doctrine so firmly established in New York, and in the Supreme Court of the United States, will generally be adopted in this country wherever the question still remains open.

posed to confine himself to certain departments, or to exclude * certain classes of goods, and in accordance therewith refused to take parcels of the excluded description. For a common-carrier does not necessarily agree to take all sorts of goods, any more than he does to carry them to all places. An express between Boston and New York does not agree to carry a load of hay, or a cargo of cotton. The carrier has a right to refuse without notice articles which obviously differ from his usual course of business, and he has also a right to define and limit that business, and give notice accordingly.

So, too, he has a right to say to all the world, and to each sender, that he will not carry goods beyond a certain value; or that if he carries such goods he must be paid for it by a premium on the increased risk. This is reasonable; and it is consistent with public policy, because it tends to give the carrier exact knowledge of what he carries, and of what risks he runs, and thus to induce him to take the proper care, and proportion his caution and his means of security to the value of the goods. (*h*)

(*h*) The notices now alluded to have often been confounded with those which exempt the carrier absolutely from his liability, and which, as we have seen in the last note, are not held valid. But it is very important that the two should be kept distinct. We have seen that there are but two cases in the English books, and those *nisi prius* cases, in which the latter have been expressly sanctioned; and that they were entirely put an end to by the Carriers Act. On the other hand, the former were sanctioned by the courts at an earlier date, were recognized in a vast number of cases previous to the Carriers Act, were established and regulated by that act, and have never, that we are aware of, been repudiated by any court in this country or in England. The case of *Nicholson v. Willan*, 5 East, 507, is generally considered as the one in which they were first sanctioned by a judicial decision. There the defendant was a coach proprietor, and had published a notice, the purport of which was that he would not be accountable for any package whatever, (if lost or damaged) above the value of 5*l.*, unless insured and paid for at the time of de-

livery. The action was brought to recover for the loss of a parcel delivered to the defendant to carry, containing goods to the value of 58*l.* No disclosure was made of the true value of the parcel, nor was any extra freight paid; and the court *held* that the defendant was protected by his notice. From this time until the passage of the Carriers Act, effect was given to similar notices in *Harris v. Packwood*, 3 Taunt. 264, (1810); *Beek v. Evans*, 16 East, 244, (1812); *Levi v. Waterhouse*, 1 Price, 280, (1815); *Bodenham v. Bennett*, 4 Price, 31, (1817); *Smith v. Horne*, 8 Taunt. 144, (1818); *Birkett v. Willan*, 2 B. & Ald. 356, (1819); *Batson v. Donovan*, 4 B. & Ald. 21, (1820); *Garnett v. Willan*, 5 B. & Ald. 53, (1821); *Sleat v. Fagg*, Id. 342, (1822); *Duff v. Budd*, 3 Brod. & Bing. 177, (1822); *Marsh v. Horne*, 5 B. & Cr. 322, (1826); *Brooke v. Pickwick*, 4 Bing. 218, (1837); *Riley v. Horne*, 5 Bing. 217, (1828); *Bradley v. Waterhouse*, M. & M. 154, (1828), and many other cases. In this state of things, the Carriers Act, 11 Geo. 4 and 1 Will. 4, c. 68, was passed. It is entitled, "An Act for the more effectual Protection of Mail Con-

It would follow then, that where the carrier interposes such *general* notice, as "all baggage at risk of owners." the

tractors, Stage-Coach Proprietors, and other common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof." The first section recites, "That whereas, by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, wagons, vans, and other public conveyances by land, for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common-carriers for hire, is greatly increased: And whereas through the frequent omission, by persons sending such parcels and packages, to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common-carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common-carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;" and enacts, "That from and after the passing of this act, no mail contractor, stage-coach proprietor, or other common-carrier by land, for hire, shall be liable for the loss of, or injury to, any article or articles or property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, &c., (enumerating various kinds of goods) contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger, in any mail or stage-coach, or other public conveyance, when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-

coach proprietor, or other common-carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." Sect. 2 enacts, "That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage-coach proprietors, and other common-carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid, at such office, shall be bound by such notice without further proof of the same having come to their knowledge." Sect. 3 enacts, "That when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common-carrier, as aforesaid shall not have or be entitled

sender may disregard it, and the baggage will be at the risk of the carrier; or he may expressly refuse to be bound by it,

to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge." Sect. 4 enacts, "That from and after the first of September now next ensuing, no public notice or declaration heretofore made, or hereinafter to be made, shall be deemed or construed to limit or in any wise affect the liability at common law of any such mail contractor, stage-coach proprietor, or other public common-carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them, but that all and every such mail contractors, stage-coach proprietors, and other common-carriers as aforesaid, shall, from and after the 1st September, be liable as at the common law, to answer for the loss of [or] any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding." Sect. 5 enacts, "That for the purposes of this act, every office, warehouse, or receiving-house, which shall be used or appointed by any mail contractor or stage-coach proprietor or other common-carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse, or office, for such mail contractor, stage-coach proprietor, or other common-carrier, and that any one or more of such mail contractors, stage-coach proprietors, or common-carriers, shall be liable to be sued by his, her, or their name or names only, and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any coproprietor or copartner in such mail, stage-coach, or other public conveyance, by land, for hire, as aforesaid." Sect. 6 enacts, "That nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common-carrier, and any other parties, for the conveyance of goods and merchandises."

The act contains eleven sections, but the other five are not very material to our present inquiry. We shall have occasion presently to notice some decisions upon the construction of this statute. In this country very few cases appear to have arisen upon notices of the kind that we are now speaking of. *Dicta* may be found, however, sustaining them, in *Orange County Bank v. Brown*, 9 Wend. 115, and in *Bean v. Green*, 3 Fairf. 422, and they were very ably vindicated by Mr. Justice Cowen, in *Cole v. Goodwin*, 19 Wend. 251. Upon the whole, in the language of Mr. Justice Redfield, "we regard it as well settled, that the carrier may, by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance, paid, beyond the mere expense of carriage." See *Farmers' and Mechanics' Bank v. Champlain Trans. Co.* 23 Verm. 186, 206.—It remains that we consider to what extent a carrier may exempt himself from his common-law liability, whether by notice or by special contract. This question first arose in the cases concerning notices. Many of those cases we have already cited in this note. They will be found, upon examination, to exhibit a considerable degree of uncertainty and contrariety of opinion upon the question. Some of them inclined to hold that a non-compliance by the bailor with the terms of the notice was a fraud on his part, and consequently that the carrier was liable for nothing short of direct *malfesance*; other cases, and the greater number, held the carrier liable for *gross negligence*: and others still, held him liable for *ordinary negligence*. No certain rule could be deduced from the cases until *Wylde v. Pickford*, 8 M. & W. 443. In that case the whole subject was elaborately examined, and the Court of Exchequer declared that the carrier, notwithstanding his notice, was bound to

and insist that his baggage shall be carried under the responsibility which the law creates; and if the carrier refuses to

use ordinary care. Parke, B., said:—"Upon reviewing the cases on this subject, the decisions and *dicta* will not be found altogether uniform, and some uncertainty still remains as to the true ground on which cases are taken out of the operation of these notices. In *Bodenham v. Bennett*, (4 Price, 34,) Mr. Baron Wood considers that these notices were introduced for the purpose of protecting carriers from extraordinary events, and not meant to exempt them from due and ordinary care. On the other hand, in some cases it has been said that the carrier is not by his notice protected from the consequences of *misfeasance*,—Lord *Ellenborough*, in *Beck v. Evans*, (16 East, 247;) and that the true construction of the words, 'lost or damaged,' in such a notice, is, that the carrier is protected from the consequences of negligence or misconduct in the carriage of goods, but not if he divests himself wholly of the charge committed to his care, and of the character of carrier. *Bayley and Holroyd, J. J.*, in *Garnett v. Willan*, (5 B. & Ald. 57, 60.) In many other cases it is said, he is still responsible for 'gross negligence;' but in some of them that term has been defined in such a way as to mean ordinary negligence, (Story on Bailments, section 11,) that is, the want of such care as a prudent man would take of his own property. *Best, J.*, in *Batson v. Donovan*, (4 B. & Ald. 30,) and *Dallas, C. J.*, in *Duff v. Budd*, (3 Brod. & B. 182.) The weight of authority seems to be in favor of the doctrine, that in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence,—gross negligence, in the sense in which it has been understood in the last-mentioned cases; and that the effect of a notice, in the form stated in the plea, is that the carrier will not, unless he is paid a premium, be responsible for all events (other than the act of God and the Queen's enemies,) by which loss or damage to the owner may arise, against which events he is by common law a sort of insurer; but still he undertakes to carry from one place to another, and

for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage; and after such a notice, it may be that the burden of proof of damages or loss by the want of such care would lie on the plaintiff." We are not aware, however, that any of the English cases have expressly held that it was incompetent for a carrier to exempt himself by notice from the consequences of his own negligence, if he used terms which could receive no other reasonable construction. But however this may be, a series of English cases since the Carriers Act, and within the last two years, seem to have settled the point there that it is competent for a carrier by an express contract between himself and his bailor to exempt himself from liability for any thing short of actual *malfeasance*. The first of these cases which it is necessary to cite is that of *Chippendale v. The L. & Y. Railway Co.*, 7 E. L. & E. 395, in the Queen's Bench. There the plaintiff who had some cattle conveyed by a railway company, received for them a ticket, which he signed, containing the terms on which the railway company carried the cattle. At the foot of the ticket there was a clause: "N. B.—This ticket is issued subject to the owner undertaking all risk of conveyance whatever, as the company will not be liable for any injury or damage, howsoever caused, and occurring to live stock of any description travelling upon the L. and Y. railway, or in their vehicles." The plaintiff saw the cattle put into the truck. During the journey some of the cattle got alarmed and broke out of the truck and were injured. The truck was so defectively constructed as to be unfit and unsafe for the conveyance of cattle. *Held*, that there was no implied stipulation that the truck should be fit for the conveyance of cattle; and that the company were protected by the terms of the ticket from liability to the plaintiff for the damage to the cattle. It should be observed, however, that *Erle, J.*, places some stress upon the fact that

take the goods, he will render himself liable to an action. But if the notice be only a limited and qualified notice, and in

the contract was for the carriage of *live stock*. He says:—"I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable; for though domestic animals might be carried safely, it might be almost impossible to carry wild ones without injury." See also *Morville v. The Great Northern Railway Co.*, 10 E. L. & E. 366. Then followed the cases of *Austin v. The M., S., & L. Railway Co.*, 11 E. L. & E. 506, in the Common Bench, and *Carr v. The L. & Y. Railway Co.*, 14 E. L. & E., 340, in the Exchequer, both decided the same day. In the former case a railway company, letting trucks for hire, for the conveyance of horses, delivered to the owner of the horses a ticket, in which it was stated that the owners were to undertake all risks of injury by conveyance or other contingencies; and further stipulated that the company would not be liable for any damages, however caused, to horses or cattle. The horses received damage through the breaking of an axle, which was attributable to the culpable negligence of the company's servants. A verdict having been found for the plaintiff, a rule *nisi* was obtained for arresting the judgment. Upon the argument, the counsel in support of the rule insisting that the defendants were protected from all liability by their notice, *Jervis, C. J.*, said:—"Must they not act as common-carriers, except so far as they limit their liability by the ticket? It seems an alarming proposition to say that they can exempt themselves from all liability. If they are allowed to do it in respect of goods, why should they not be able to do it in the case of passengers? Supposing they were to be treated as gratuitous bailees, would they not be liable for gross negligence?" But after taking time to consider, the rule was made absolute, *Cresswell, J.*, delivering the judgment of the court in an elaborate opinion. In *Carr v. The L. & Y. Railroad Co.*, the plaintiff being the owner of a horse delivered it to the defendants, a railway company, to be carried on their railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for

any injury or damage, however caused, accruing to live stock of any description travelling on the railway. The horse having been injured by the horsebox being propelled against some trucks through the gross negligence of the company:—"Held, *hesitante Platt, B.*, that the company, under the terms of the contract, were not responsible for the injury. But *quere*, per *Alderson, B.*, whether the company would have been responsible if the horse had been stolen. *Parke, B.*, said:—"The question in this case turns upon the notice which was given by the defendants, and which forms the foundation of the contract between the parties. It is plain that since the passing of the Carriers Act, it is competent for carriers to make a special contract. Such a contract was made in this case, and the only question is as to the meaning of that contract. According to the old cases, there was this limitation upon the construction of carriers' notices, that unless a carrier excluded his liability in express terms, according to the ordinary terms of the notice, he would be responsible for gross negligence. The practice of a carrier protecting himself by notice, was put an end to by the Carriers Act. . . . Prior to the establishment of railways the court were in the habit of construing contracts between individuals and carriers, much to the disadvantage of the latter. Before railways were in use the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of conveyance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger; the rapid motion, the noise of the engine, and various other matters are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making

itself reasonable, the sender, having knowledge of it, is bound by it. Nor can he insist that the carrier shall receive and transport his goods without reference to it.

special contracts. The question is, whether they have done so here. The jury have found that the defendants have been guilty of gross negligence, and that must be taken as a fact. In my opinion, the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (however caused) occurring to live stock of any description, travelling upon their railway. This, then, is a contract, by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement. In the case of *Austin v. The Manchester, Sheffield, & Lincolnshire Railway Company*, 20 Law J. Rep. (N. S.) Q. B. 440; (S. C. 5 Eng. Reps. 329,) the language of the contract was different from the present, but not to any great extent. (His lordship stated the case.) In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made." *Alderson, B.*—"The defendants in this case undertook to carry the goods in question on certain terms. The question then is, what are those terms? It is clear that they are such as the defendants might lawfully make. It is plain to me that they undertook to carry the horse at the risk of the plaintiff. The words are, 'the owners undertaking all risk of conveyance whatsoever.' Now, under those terms a question might be raised whether the injury contemplated was such as must issue in injury to the thing conveyed; so that a doubt might arise whether the case of the horse being

stolen was contemplated, as under such circumstances the accident would not issue in damage to the horse. But that question would not arise here, as in this case the horse itself has been injured. The result is, that if there has been gross negligence, on the part of the defendants, they are protected against liability by virtue of the words of the contract." *Platt, B.*—"The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The *gravamen* of the charge is the gross negligence. Now undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is, therefore, said that new stipulations are necessary to guard carriers from risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes, and that unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occur whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract." *Martin, B.*—"I agree in opinion with my brothers Parke and Alderson. This is the case of a special contract which the plaintiff has adopted and assented to. Without doubt, at common law, a carrier is entitled to make a special contract. If, indeed, he refuses to carry goods, except on the terms of a special contract, he is liable to an action; but if he makes a special

The question has arisen, whether, where a reasonable and legal notice has been given to the sender, there still rests on

contract it must be abided by. The Carriers Act says that a special contract may be made. It is, then, our duty to see what contract the parties have made. Insurers are answerable for gross negligence, and if goods may be insured, others may contract that they will not be answerable for their own gross negligence. In this case, the language used by the parties cannot be stronger than it is. I am unable to say what was passing in the mind of the owner of the horse. I am to look only at the terms of the notice, and if the carrier had been desirous of preparing a contract by which he would get rid of his liability in respect of gross negligence, he could not have used more apt words than those that are contained in this notice. With respect to the argument of inconvenience, the answer is, that we have nothing to do except to carry out this contract; the parties concerned, and not ourselves, are to judge of the inconvenience. If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters. There are, indeed, inconveniences attending either mode of construing the contract, but, in my opinion the defendants are not answerable under this contract for any risk arising from gross negligence." In this country, however, it would seem to be pretty nearly, if not quite settled, that it is incompetent for a carrier, either by notice or express contract, to exempt himself from liability for his own negligence. The strongest case that we have seen to this effect is the late case of *Sager v. The Portsmouth &c. R. R. Co.*, 31 Maine, 228. There the defendants had transported the plaintiff's horse from Boston to Portland. It was upon a cold day in November. The horse was carried in an open car, and suffered serious injury from the exposure to the cold. This action was brought to recover damages for that injury. The defendants introduced a paper signed by the plaintiff, whereby he agreed to exonerate the company from all damages that might happen to any horses, oxen, or other live stock that he should send over the company's road; meaning thereby, that he took the risk upon

himself of all and any damages, that might happen to his horses, cattle, &c.; and that he would not call upon said company or any of their agents for any damages whatever. At the trial the learned judge instructed the jury that this contract would not exempt the company from liability for their own malfeasance, misfeasance, or negligence. And this instruction was held correct. *Shepley, C. J.*, after speaking of the construction put upon notices by the English courts, said:—"The notices were usually given in terms so general, that a literal construction of the contract thus arising out of them, would have exonerated the carriers from liability for their own misfeasance or negligence, and for that of their servants. Yet the well established construction of them has been, that they were not thereby relieved from their liability to make compensation for losses thus occasioned." The learned judge then proceeded to an examination of the authorities; and, having stated that the court had formerly declared that the power of carriers to limit the liability imposed upon them by law should not be favored or extended, he continued: "If a literal construction of the agreement signed by the plaintiff would exonerate the defendants from losses occasioned by the negligence of their servants, it will be perceived, that it could not be permitted to have that effect without a violation of established rules of construction, and without a disregard of the declared intention of this court not to extend the restriction of the liability of common-carriers. The very great danger to be anticipated, by permitting them to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over-estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances. It, however, requires no forced construction of that agreement, to regard it as effectual to place the defendants in the position of bailees for hire, and as not exonerating them from liability for losses occasioned by misfeasance or negligence. The latter clause, 'we will not call upon the railroad company or any of their agents for any

the carrier the obligation of a special inquiry; so that without such inquiry the sender may transmit or the passenger may take his goods in silence, and have them covered by the same responsibility as if he had complied with the notice, and had stated the extra value of the goods, and paid the extra price. We cannot doubt that the weight of authority, as of reason and of justice, is, that such notice makes such inquiry unnecessary, and that the owner of the goods would in such case be considered either as taking the risk upon himself, or as endeavoring to cast it fraudulently upon the carrier. (i)

damages whatsoever,' considered without reference to the preceding language, would be sufficiently broad to excuse them from making compensation for losses occasioned by wilful misconduct. It is most obvious that such could not have been the intention; and that the true meaning and intention was, that they would not call upon them for any damages whatsoever, 'that may happen to any horses, oxen, or any other live stock, that we send or may send over said company's railroad.' The intention of the parties, by the use of the language contained in this last clause, is then attempted to be explained as follows:—meaning by this, that we will take the risk upon ourselves of all and any damages, that may happen to our horses, cattle, &c. The meaning of damages happening to live animals is to be sought. The word, happen, is defined by the words, to come by chance, to fall out, to befall, to come unexpectedly. An accident, or that which happens or comes by chance, is an event, which occurs from an unknown cause, or it is the unusual effect of a known cause. This will exclude an event produced by misconduct or negligence, for one so produced is ordinarily to be expected from a known cause. Misconduct or negligence under such circumstances would usually be productive of such an event. Lord *Ellenborough*, in the case of *Lyon v. Mells*, (5 East, 428,) speaking of what 'may or may not happen,' explains it as, 'that which may arise from accident and depends on chance.' An injury occasioned by negligence, is the effect ordinarily to be expected as the consequence of that negligence, without reference to any accident or chance. A correct construction of the agreement will not

therefore relieve the defendants from their liability for losses occasioned by the misfeasance or negligence of their servants." So in *Reno v. Hogan*, 12 B. Monr. 63, the carriers received a box of glass, with a clause in the bill of lading, that they should not be "accountable for breakage." On its arrival at the place of destination, the glass was found broken into small fragments, which was proved to have been caused by the gross negligence of the defendant or his servants. The court, while admitting the validity of the special contract, held that its provisions did not apply to injuries arising from gross negligences. Opinions and *dicta* to the same effect will be found in *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. 136; *Stoddard v. Long Island R. R. Co.* 5 Sandf. 180; *Laing v. Colder*, 8 Barr. 479; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Slocum v. Fairchild*, 7 Hill, 292; *Swindler v. Hilliard*, 2 Rich. 286; *Parsons v. Monteath*, 13 Barb. 353; *Stoddard v. Long Island R. R. Co.*, 5 Sandf. 180; *Camden & Amboy R. R. Co. v. Baldauf*, 16 Penn. State Rep. 67. See also the notes of the learned American editors to *Austin v. The M. S.*, and *L. Railway Co.*, 11 E. L. & E. 506, and *Carr v. The L. & Y. Railway Co.*, 14 Id. 340. See also *Shaw v. York & No. Midland Railway*, 13 Q. B. 353; *Morville v. Great Northern Railway Co.* 10 E. L. & E. 366.—In England it has been held after much consideration that notices published in pursuance of the Carriers Act, if not complied with, exempt the carrier from liability for gross negligence. *Hinton v. Dibbin*, 2 Q. B. 646. See also *Owen v. Burnett*, 2 Cro. & M. 353.

(i) It would be of no avail for a car-

SECTION XV.

OF FRAUD.

All fraud, or wilful misrepresentation, or intentional concealment, on the part of the sender of goods, or of the passenger, extinguishes the liability of the common-carrier, so far as it is affected by such misconduct; and this must be equally true whether the fraud consists in the disregard of a notice, or, where there is no notice, of an intention to cast upon the carrier a responsibility which he is not obliged to

rier to publish a notice if he was still bound to make a special inquiry; for this he may do without publishing a notice, and the bailor must inform him correctly, at his peril. That a notice brought to the knowledge of the bailor dispenses with any further inquiry, see *Batson v. Donovan*, 4 B. & Ald. 21; *Marsh v. Horne*, 5 B. & Cr. 322; *Duff v. Budd*, 3 Brod. & Bing. 177; *Harris v. Packwood*, 3 Taunt. 264; *Bodenham v. Bennett*, 4 Price, 31; *Garnett v. Willan*, 5 B. & Ald. 53; *Sleat v. Fagg*, Id. 342. But see the remarks of *Bronson, J.*, *contra*, in *Hollister v. Nowlen*, 19 Wend. 234. So under the Carriers Act, it is held to be the duty of the sender of goods therein enumerated, and exceeding £10 in value, to take the initiative by giving notice to the carrier of their value and nature, in order to charge the latter in respect of their loss; and this whether the goods be delivered at the office of the carrier or not. *Baxendale v. Hart*, 9 E. L. & E. 505, 6 Id. 468. — But the carrier will be held to very strict proof that the notice was brought to the knowledge of the bailor. *Hollister v. Nowlen*, 10 Wend. 234; *Brooke v. Pickwick*, 4 Bing. 218; *Bean v. Green*, 3 Fairf. 422; *Riley v. Horne*, 5 Bing. 217; *Clayton v. Hunt*, 3 Camp. 27; *Cobden v. Bolton*, 2 Camp. 108; *Butler v. Heane*, Id. 415; *Kerr v. Willan*, 2 Stark. 53; *Davis v. Willan*, 2 Stark. 279. In *Camden & Amboy Railroad Co. v. Baldauf*, 16 Penn. State Rep. 67, where the notice was in the English language, and the passenger

was a German, who did not understand English, it was held incumbent on the carrier to prove that the passenger had actual knowledge of the limitation in the notice. But the strongest case to be found upon this point is that of *Brown v. Eastern Railroad Co.*, decided by the Supreme Court of Massachusetts, March Term, 1851, a brief note of which is given in 6 Law Rep. N. S. 39. It was an action of assumpsit for lost luggage. There was a notice printed on the back of the passage-ticket given to the plaintiff, that the defendants would not be responsible beyond a specified sum; but no other notice was given, nor was her attention called to this. *Held*, that if a common-carrier can limit his responsibility in this way, it must be clearly shown that the other party is fully informed of the terms and effect of the notice; and that the facts in this case did not furnish that certain notice which must be given to exonerate such carrier from his liability. This question is put an end to in England by the Carriers Act, the mere publication in pursuance of the statute being held to be constructive notice to all. *Baxendale v. Hart*, 9 E. L. & E. 506, 6 Id. 468. — So the notice must be clear and explicit, and if ambiguous will be construed against the carrier. *Beckman v. Shouse*, 5 Rawle, 179; *Camden & Amboy Railroad Co. v. Baldauf*, 16 Penn. State Rep. 67; *Barney v. Prentiss*, 4 H. & Johns. 317. So if there are two notices, he will be bound by the one least beneficial to him. *Cob-*

assume, which he does not know of, and against which he cannot therefore take the proper precautions. (*j*)

*Indeed, the principle that the carrier is bound only by a responsibility which he knows and can provide for, seems to be the principal cause of a recent modification of his liability in respect to the baggage of a passenger, which appears now to be quite well settled. It may be stated thus; the common-carrier of passengers is not liable as such for the loss of their baggage, beyond that amount which he might reasonably suppose such passenger would carry with him; nor for property such as is not usually included within the meaning of baggage. Thus, not for goods carried by way of merchandise; (*k*) nor for a larger sum of money than the passenger might reasonably take on such a journey for his expenses. (*l*)

den *v.* Bolton, 2 Camp. 108; Munn *v.* Baker, 2 Stark. 255.

(*j*) Gibbon *v.* Paynton, 4 Burr. 2298; Kenrig *v.* Eggleston, Aleyn, 93; Tily *v.* Morrice, Carth. 485; Anon. cited by Hale, C. J., in Morse *v.* Slue, 1 Vent. 238; Titchburne *v.* White, 1 Str. 145. And see Batson *v.* Donovan, 4 B. & Ald. 22.

(*k*) Therefore the word "baggage" has been held not to include a trunk containing valuable merchandise and nothing else, although it did not appear that the plaintiff had any other trunk with him. Pardee *v.* Drew, 25 Wend. 459. So in Hawkins *v.* Hoffman, 6 Hill, 586, it was held that the term "baggage" did not embrace samples of merchandise carried by a passenger in a trunk, with a view of enabling him to make bargains for the sale of goods. But in Porter *v.* Hildebrand 14 Penn. State Rep. 129, where the plaintiff was a carpenter, moving to the State of Ohio, and his trunk contained carpenter's tools to the value of \$55, which the jury found to be the reasonable tools of a carpenter, it was held that he was entitled to recover their value. See also Dwight *v.* Brewster, 1 Pick. 50; Beckman *v.* Shouse, 5 Rawle, 179; Bomar *v.* Maxwell, 9 Humph. 621; Great Northern Railway Co. *v.* Shepherd, 9 E. L. & E. 477, 14 Id. 367; Mad River and Lake Erie Railroad Co. *v.* Fulton, 20 Ohio, 318.

(*l*) Thus, in the case of Orange

County Bank *v.* Brown, 9 Wend. 85, it was held that the owner of a steamboat used for carrying passengers was not liable for a trunk, containing upwards of \$11,000 in bank bills, brought on board by a passenger as baggage, the object being the transportation of money. And in Hawkins *v.* Hoffman, 6 Hill, 586, it was doubted by Bronson, J., whether money to pay travelling expenses could be included within the term baggage. "Men," says he, "usually carry money, to pay their travelling expenses, about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage." It is, however, well settled that a traveller may carry, as a part of his baggage, a reasonable amount of money to pay his expenses. Thus, in Jordan *v.* Fall River Railroad Co. 5 Cush. 69, it was held that common-carriers of passengers are responsible for money *bonâ fide* included in the baggage of a passenger for travelling expenses and personal use, to an amount not exceeding what a prudent person would deem proper and necessary for the purpose. And Fletcher, J., after a critical examination of the case, said:—"Upon consideration of the whole subject, and referring to the cases, the court have come to the conclusion, that money *bonâ fide* taken for travelling expenses and personal use may properly be regarded as forming a part of a traveller's baggage. The

But there may be special articles, as fishing gear, or sporting apparatus, which one carries for his amusement; (*m*) and in * these and other cases it may often be very difficult to draw the line between what would come within the liability of the carrier, and what would not. The question would not only be materially affected by circumstances, but is one of those upon which different individuals would be very likely to differ; and it is perhaps impossible to fix upon any thing like a definite standard. But the principle is plain enough, and the reason and justice of it are undeniable. And the difficulty in the application of the principle, whether by the court or by the jury, is of a kind which must often occur in the administration of the law. It must always be a question of mixed law and fact; where the court state the principle,

time has been, in our country, when the character and credit of our local currency were such, that it was expedient and needful, for persons travelling through different States, to provide themselves with an amount of specie, which could not conveniently be carried about the person, to defray travelling expenses. But even if bills are taken for this purpose, it may be convenient and suitable that they should be, to some amount, placed in a travelling trunk, with other necessary articles for personal use. This would seem but a reasonable accommodation to the traveller. It has been objected, that the carrier will not expect that there will be money with the baggage, and will not therefore be put upon his guard. But surely a carrier may very naturally understand and expect, that a passenger will place his money for expenses, or some part of it, in his trunk, instead of carrying it all about his person; he certainly might as naturally expect this as that there would be jewels or a watch in a travelling trunk, for which articles a carrier has been held responsible. The passenger is not bound to give notice of the contents of his trunk, unless particular inquiry be made by the carrier. But it must be fully understood that money cannot be considered as baggage, except such as is *bonâ fide* taken for travelling expenses and personal use, and to such reasonable amount only as a prudent person would deem necessary and proper for

such purpose. But money intended for trade, or business, or investment, or for transportation, or any other purpose than as above stated, cannot be regarded as baggage." See to the same effect *Weed v. S. & S. Railroad Co.* 19 Wend. 534; *Bomar v. Maxwell*, 9 Humph. 621; *Johnson v. Stone*, 11 Humph. 419.

(*m*) "If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such." Per *Bronson, J.*, in *Hawkins v. Hoffman*, 6 Hill, 586. So in *Brooke v. Pickwick*, 4 Bing. 218, and *McGill v. Rowand*, 3 Barr, 451, carriers were held responsible for ladies' trunks containing apparel and jewels. So in *Woods v. Devin*, 13 Ill. 746, a common-carrier of passengers was held liable for the loss of a pocket-pistol and a pair of duelling pistols, contained in a carpet-bag of a passenger, which was stolen out of the possession of the carrier. And in *Jones v. Voorhees*, 10 Ohio, 145, it was held that a gold watch of the value of ninety-five dollars was a part of a traveller's baggage, and his trunk a proper place to carry it in. But see *Bomar v. Maxwell*, 9 Humph. 621, where the plaintiff's trunk contained "a silver watch, worth about thirty-five dollars; also, medicines, hand-cuffs, locks, &c., worth about twenty dollars," and the court said:—"The watch alleged to have been in the

and illustrate its bearing upon the case at bar, as they see fit, and the jury apply the principle so stated as they best can. In regard to the proof of the contents of a passenger's trunk, the prevailing American authority holds that the liability of the carrier for *some* amount having been established *aliunde*, the plaintiff is a competent witness *ex necessitate*, to prove the contents of his trunk and their value. (*n*) From the same necessity, the wife of the owner has been admitted to prove the same facts. (*o*) But the rule for the admission of such evidence does not extend farther than to the proof of such as being commonly carried in a traveller's trunk, may be expected to be there. (*p*) In Massachusetts it seems to be settled that the common-law rule prevails, and neither the owner nor his wife can be a witness in an action brought by the owner. (*q*)

trunk, clearly does not fall within the meaning of the term, baggage; and much less the hand-cuffs, locks, &c.; these certainly do not usually constitute part of a gentleman's wardrobe, nor is it perceived how they are necessary to his personal comfort on a journey in a stage coach."

(*n*) *Sneider v. Geiss*, 1 Yeates, 34; *Clark v. Spence*, 10 Watts, 335; *Oppenheimer v. Edney*, 9 Humph. 385; *Johnson v. Stone*, 11 Humph. 419; *Whitesell v. Crane*, 8 W. & S. 369; *Mad River &c. R. R. Co. v. Fulton*, 20 Ohio, 318; *Sparr v. Wellman*, 11 Missouri, 230.

(*o*) *McGill v. Rowand*, 3 Barr, 451; *Mad River &c. R. R. Co. v. Fulton*, 20 Ohio, 318.

(*p*) *Mad River &c. R. R. Co. v. Fulton*, 20 Ohio, 318. Therefore it has been held not to extend to "medical books, medicines, surgical instruments, and chemical apparatus." *Pudor v. B. & M. Railroad Co.* 26 Maine, 458. And see *Bingham v. Rogers*, 6 W. & S. 495.

(*q*) *Snow v. Eastern Railroad Co.* 12 Met. 44. In this case *Hubbard, J.*, said:

—"To admit the plaintiff's oath, in cases of this nature, would lead, we think, to much greater mischiefs, in the temptation to frauds and perjuries than can arise from excluding it. If the party about to travel places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are, and of their value, or provide other evidence, beforehand, of the articles taken by him. If he omits to do this, he then takes the chance of loss, as to the value of the articles, and is guilty, in a degree, of negligence—the very thing with which he attempts to charge the carrier. Occasional evils only have occurred from such losses, through failure of proof; the relation of carriers to the party being such that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented; no facts which have not repeatedly occurred; no new combination of circumstances."—See, further on this question, the editors' note to *Great Northern Railway Co. v. Shepherd*, 9 E. L. & E. 477, and 1 Greenl. Ev. 348.

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